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CURRENT EVENTS.

UNDER the constitution of the United States, laws and treaties are of equal binding force as regards internal obligation. Neither has a higher validity than the other, and in case of conflict between a law and a treaty, the one which comes later in point of time must prevail. This is the generally accepted doctrine of constitutional law, as to the relative binding force of laws and treaties, and it is the doctrine which has just been affirmed by the United States Supreme Court in the case of Chae Chang Ping. There, the court upheld the validity of the Scott Chinese Exclusion Act, in spite of the fact that that act contravened express stipulations of the treaty of 1868 and the supplemental treaty of 1880, holding that congress has power to abrogate a treaty, and the undoubted right to exclude aliens whose presence is inimical to our interests. A question may, of course, arise as to the propriety of the government thus abrogating treaty provisions, but this question, the court says, is one for the consideration of the political departments of government, and not a matter for judicial cognizance. The petitioner in this case had left this country with a certificate, which, under a previous act and treaty, allowed him to return, and the contention was made that the Scott act thus destroyed vested rights. The court ruled however that the only rights which can become vested in this sense are such as are connected with and lie in property capable of sale or transfer, not such as are personal and untransferable in their character.

THE passage of the Weldon extradition act in the Canadian parliament is a matter of more than ordinary interest to the United States. Up to about half a generation ago the extradition regulations between this country and Great Britain were reasonably adequate. They covered the more important crimes. In recent years, however, offenses growing out of breaches of trust, not included in the treaties with Great Britain, have become common and it is against malefactors of this category that the Canadian enactment is especially directed. For several years past the United States has been endeavoring to bring about a treaty with England whereby persons guilty of breaches of trust in either country may be secured if found in the domain of the other. All these attempts failed however, and now relief comes from the quarter, from which it was least expected but from which it was most sorely needed. The projectors of the Weldon act first sought to make it retroactive, so as to cover offenses already committed. But this feature of the bill failed, though it has recently been seriously contended that under its language the measure is in effect, retroactive.

A LAW of this sort made by a British province is something of an innovation. It involves no contract between this country and Canada, for the latter's relations with the Imperial government forbid her from entering into any such compact. The extradition of criminals becomes a matter of legal obligation only through treaty, but there is nothing to prevent a country for reasons of comity or otherwise from extraditing offenders. The power to surrender escaping criminals is part of the police power in every government, independent of treaties. The chief utility of extradition treaties is to secure full reciprocity and greater certainty. International jurists have been divided upon the question how far a State is obliged to deliver up criminals in the absence of a treaty. Many of the earlier publicists, with Grotius at their head, held that, according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to individuals accused of crimes, affecting the general peace and security of society and whose extradition is demanded by the government of the country within whose jurisdiction the crime has been committed. This was the view of our own great jurist, Chancellor Kent, who declared that it rested on the plainest principles of justice. The weight of the more modern authorities, however, seems to be against this doctrine. They hold that the duty is one of imperfect obligation, and that though it may be habitually practiced by some States it requires to

be confirmed and regulated by special convention, in order to give it the force of international law. This view seems to be borne out by the modern practice of civilized nations. The existence of the numerous treaties between particular countries, regulating the practice of extradition, seems to show that the duty is not regarded as one founded on principles of international law, irrespective of special compact.

NOTES OF RECENT DECISIONS.

THE question as to whether laches will bar the United States on a bill filed to redeem from a mortgage, property purchased by it at a sale under execution, was considered by the United States Supreme Court in United States v. Insley, 9 S. C. Rep. 485. It was held that, by analogy to former rulings to the effect that the United States are not bound by the statute of limitations, it could not be barred by laches, as it holds title to property for public and not for private purposes. The court says:

The decision of the circuit court, reported in 25 Fed. Rep. 804, proceeded upon the ground that, as the government in this case came into a court of equity, claiming the same rights as a private individual, and the case did not involve any question of governmental right or duty, the ordinary rules controlling courts of equity as to latches should be enforced; and that, as the bill was filed more than twelve years after the sheriff's deed had been made to Polly Palmer, and more than thirteen years after the sale on execution to the United States, the claim of the government was barred by its laches. This decision of the circuit court was made in December, 1885, prior to the decisions of this court in the cases of Van Brocklin v. State of Tennessee, 117 U. S. 151, 6 S. C. Rep. 670; U. S. v. Railway Co., 118 U. S. 120, 6 S. C. Rep. 1006; and U. S. v. Beebe, 127 U. S. 338, 8 S. C. Rep. 1083. These cases determine that the decree in the present case must be reversed. In Van Brocklin v. State of Tennessee 6 S. C. Rep. 674, this court said: "The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts, and excises must be laid and collected, 'to pay the debts and provide for the common defense and general welfare of the United States.'" In the present case, the United States holds the title to the property in question, as it holds all other property, for public purposes, and not for private purposes. So holding the title and the right of possession under their deed, it holds in the same manner, and for public purposes, the incidental right of redemption. In this view, the doctrine often laid down, and again enforced in U. S. v. Railway Co., *supra*, applies to this case. It was there said: "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless congress has clearly manifested its intention that they should be so bound. Lindsey v. Miller, 6 Pet. 666; U. S. v. Knight, 14 Pet. 301, 315; Gibson v. Chouteau, 13 Wall. 92; U. S. v. Thompson, 98 U. S. 486; Fink v. O'Neil, 106 U. S. 272, 281," 1 S. C. Rep. 325. This doctrine is applicable with equal force, not only to the question of a statute of limitations in a suit at law, but also to the question of laches in a suit in equity. In U. S. v. Beebe, *supra*, it was said: "The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a public interest, is established past all controversy or doubt." These views entirely cover the present case. It was suggested in the decision of the court below, as a ground for applying to the United States the doctrine of laches, that the government was not made a party to the foreclosure suit because it could not have been made such party except at its own will, and that it would be a hardship to the other parties to this suit to allow the government to lie by for so many years, and then come into a court of equity to assert the rights sought to be maintained in this suit. It is a sufficient answer to this view to say that the principle we have announced has long been understood to be the rule applicable to the government, and that it rests with congress, and not with the courts, to modify or change the rule.

As to whether words spoken by husband to wife constitute a publication within the meaning of the law of slander, the Supreme Court of California, in Sesler v. Montgomery, 21 Pac. Rep. 185, seems to have reversed itself on rehearing. They held in the original decision, 19 Pac. Rep. 686, that such a communication from husband to wife, not in the presence of any other person, is a publication. On rehearing they conclude that it does not constitute a publication, saying:

There is no doubt of the general common law rule that the civil existence of the wife is merged in that of her husband. Blackstone says that "by marriage the husband and wife are one person in law," and that "the legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband." Volume 1, p. 442. Upon this principle of the legal union of husbands and wives most of their rights, duties, and disabilities depended. And upon this ground it has been always held that no prosecution for conspiracy can be maintained against a husband and wife only; because the crime of conspiracy cannot be committed by one person alone, and a husband and wife are but one person in law. Hawk. P. C. p. 448, § 8; 2 Russ. Crimes, 690; People v. Richards, 67 Cal. 412. It is said that this rule was a legal fiction, and that in the course of modern legislation and judicial decisions it has been exploded. But it is no more a fiction than any other general principle of law, and we have seen no authentic account of the explosion. There always were some exceptions to the rule, from the earliest history of the common law, and modern legislation and decision have

merely created additional exceptions. The general rule still obtains, save where an exception has been legally established, and we have been referred to no decision establishing an exception as to the point involved in the case at bar. Indeed, the only case in point cited at all is from an inferior court of New York, Trumbull v. Gibbons, 3 City H. Rec. 97, in which it was directly held that the delivery of a defamatory manuscript by a husband to a wife was not a publication. And every sound consideration of public policy, every just regard for the integrity and inviolability of the marriage relation—the most confidential relation known to the law—should restrain a court from establishing the exception upon which the judgment in the case at bar rests. When husbands and wives talk to each other alone, the conversation differs but little from the process of talking to one's self, or, as it is sometimes called, "thinking aloud." There is no intention that the conversation shall be repeated to others, and no presumption that it will be. It would be strange, indeed, if a husband or wife could not safely say anything to the other about their neighbors or acquaintances which he or she would not feel warranted in saying to the world. Such a rule would destroy all opportunity for confidential conference, advice, or suggestion. And See Scheneck v. Scheneck, 20 N. J. L. 208.

A QUESTION of interstate commerce came before the Supreme Court of Minnesota in State v. Chicago, St. P., M. & O. Ry. Co., 41 N. W. Rep. 1047. There it was held that the railroad and warehouse commission of the State has no authority to fix rates for carriage between two points within that State over a route extending across a neighboring State. The court says:

By section 8, art. 1, Const. U. S., congress is empowered "to regulate commerce with foreign nations, and among the several States." The transportation of property by a common carrier, including the rates to be charged therefor, is embraced within the meaning of the word "commerce," as here used. Gibbons v. Ogden, 9 Wheat. 1; Case of State Freight Tax, 15 Wall. 232; Lord v. Steamship Co., 102 U. S. 541; Railway Co. v. Illinois, 118 U. S. 557; Steamship Co. v. Pennsylvania, 122 U. S. 326; Fargo v. Michigan, 121 U. S. 230; Carton v. Railroad Co., 59 Iowa, 481. Since the decision in Railway Co. v. Illinois, 118 U. S. 557, it must be regarded as settled, whatever doubts may have been previously entertained, that the regulation, as by prescribing rates, of such transportation as is to be deemed interstate as distinguished from wholly domestic carriage is exclusively given to congress. The only question upon which there can be any doubt is whether the transportation to which this order of the commission relates is to be deemed commerce or transportation between different States, within the meaning of the constitutional provision above quoted, or as being in its nature merely domestic commerce or transportation, to be governed wholly by our State laws, and over which congress has no control. The order prescribing rates, and to enforce the observance of which is the object of this proceeding, applies to the entire route from Duluth to Mankato, a large part of which—indeed, the greater part of which—lies beyond the boundaries of our State, and within the territory of another sovereignty. These rates are for the continuous carriage of freight over the entire route, including the transit of 148 miles through the State of Wisconsin. The order is as applicable to that part of the line as to that which is within our own State, and can only be sustained upon the theory that the railroad and warehouse commission of the State of Minnesota has authority to determine what charges may be made for the transportation of freight by a common carrier through the State of Wisconsin, provided only that the carrier receives the property within this State, and is to carry it through the foreign State to a destination within our own borders. In view of the above decisions of the Supreme Court of the United States, that the transportation of freight by a common carrier, apart from considerations of contract concerning the property as between the shipper and the consignee, is a subject of "commerce," to which the constitution applies, it is not a matter of controlling importance that the consignor and consignee, or place of shipment and destination, be within the same State, if the transportation is through a foreign State. * * * The question under consideration has not come before the Supreme Court of the United States in the form here presented; but it seems to us that that court has so determined the construction and effect of the commerce clause in the constitution that, following its decisions, as we are bound to do in such cases, the result already indicated cannot be avoided. We need not again refer to the many decisions, some of which have been cited, which leave no doubt that transportation is commerce within the meaning of the constitution, and that the authority of congress is exclusive as respects the regulation of rates for interstate commerce. Lord v. Steamship Co., 102 U. S. 541; Sterberger v. Railroad Co., 7 S. E. Rep. 836. * * * The interstate commerce commission has recently ruled upon the question here presented, holding that commerce between points in the same State, but which, in being carried from one place to the other, passes through another State, is interstate commerce, subject to congressional regulation. Cotton Exchange v. Railway Co., Interst. Comm. R. 375. We are aware that the Supreme Court of Pennsylvania has held to the contrary. Com. v. Railroad Co., 7 Atl. Rep. 179. If those cases were wholly analogous to that before us, that court has not regarded the decision of the court of last resort in such cases, in Lord v. Steamship Co., *supra*, as having the effect which we think must be accorded to it.

As to the practice in equity in the adoption of the findings of a jury on questions of fact, the Supreme Court of Illinois, in Guild v. Hull, 20 N. E. Rep. 665, says:

In chancery cases, except in cases where the submission to a jury is required by law or the rules of chancery practice, the chancellor is the judge of the weight of the evidence and of the ultimate facts established by it. If he submits controverted questions of fact to a jury, as he may do, the verdict or finding of the jury is advisory merely. He may adopt the verdict, or set the same aside and resubmit the question to a jury, or he may disregard it and enter such a decree as in his judgment equity demands. He may enter his decree after setting the verdict aside or without setting it aside. Sibert v. McAvoy, 15 Ill. 108; Williams v. Bishop, *Id.* 553; Milk v. Moore, 39 Ill. 588; Sharkey v. Miller, 69 Ill. 560; Meeker v. Meeker, 75 Ill. 260; Smith v. Newton, 84 Ill. 14; Calvert v. Carpenter, 96 Ill. 63; Russell v. Fanning, 2 Ill. App. 632. It appears that

the chancellor in this case made no independent finding, but rendered his decree in pursuance of the finding of the jury, "and not otherwise." The decree is *pro forma*, and *pro forma* only. This precludes the idea or presumption that the court acted upon its own judgment as to the truth of the allegation upon which the deed and bill of sale were set aside. Parties litigant are entitled to the judgment of the chancellor, and his consideration of the evidence, notwithstanding the verdict of the jury. As the decree is based on the verdict of the jury alone, and not upon any independent judgment of the circuit court, it must follow that, if the finding of the jury was the result of, or was influenced by, the admission of improper evidence, or by improper instructions given by the court, the decree should be reversed. The condition is somewhat anomalous, but the effect must necessarily be the same as though the decree was based upon improper evidence or a misconception of the law applicable. In such case there can be no presumption that the chancellor acted upon proper evidence only, and rejected that which was incompetent. It therefore becomes necessary to examine whether the court below erred in the admission of evidence or in its rulings. Nor is this position rendered untenable by the fact that this court may pass upon the evidence submitted under the issues presented by the pleadings and determine the fact at issue, and enter such decree, or direct the entry thereof by the circuit court, as it shall find from the evidence pertains to equity and good conscience.

A NICE question as to the construction of a will and power of sale arose in Harmon v. Smith, decided by the United States Circuit Court of Minnesota (not yet reported). There a testator gave all the rest and residue of his real and personal estate to his executor, with full power to sell and convey any or all of said estate, and convert the same into money for the use and benefit of his sister, who is made sole legatee, and also directs him to pay over the avails to her. Shortly after and before any sale the sister died. Thereafter the executor sells under the power to defendants, and plaintiffs, as representatives of the sister, file this bill to set aside such sale. The court holds:

That it is clear the testator intended that his whole real and personal estate should become united in one common fund for the purpose of distribution to the sole object of his bounty. The executor took only the legal title, subject to the trust, and in the death of the legatee the estate vested in her representatives. The trust ceased to be active and was then determined, and the estate belonged to the complainants. The legal estate remained in the trustee so long as the execution of the trust required it, and no longer. Young v. Bradley, 101 U. S. 787. No ulterior purpose for maintaining the trust is evinced. No sale was authorized, except to convert the estate into money for the benefit of Mrs. Heath, legatee, and when the executor undertook to sell after her death the sale was utterly void.

A case almost its counterpart is Fidler v. Lash, 17 Atl. Rep. 240, decided by the Supreme Court of Pennsylvania. A similar conclusion was reached that the power of sale was exercisable only during the life-time of the beneficiary, the court stating that "no principle is better settled than that when the object for which a power has been created has been accomplished, or has become impossible or unattainable, the power itself ceases to exist, Wilkinson v. Buist, 16 Atl. Rep. 856; Ely v. Dix, 9 N. E. Rep. 62.

THE right of a State to impose license tax on peddlers came before the Supreme Court of West Virginia in State v. Richards, 9 S. E. Rep. 245. It was there held that the statute which reads: "Nor shall any agent traveling with one or more horses sell any lighting-rod, sewing-machine, or organ or other musical instrument, without a State license therefor," is not unconstitutional, as applied to such agents selling sewing-machines manufactured outside of this State. The court distinguish between such a statute and the statutes taxing "drummers" declared unconstitutional by the United States Supreme Court. They say:

The counsel for defendant cites and relies on the case of Robbins v. Taxing Dist., 120 U. S. 489, 7 S. C. Rep. 592, holding that a statute of Tennessee, that "all drummers and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale or selling goods by sample," should be required to pay taxes for the privilege, was void as contrary to the United States constitution as to persons soliciting the sale of goods on behalf of individuals or firms doing business in another State. It must be admitted that this case and the case of Asher v. Texas, 128 U. S. 129, 9 S. C. Rep. 1, are in advance of former decisions of the same court in restricting taxation on callings by the State, if not in conflict with them, as seems to be admitted by Justice Bradley in the latter case. But they were cases of persons selling by sample or soliciting orders for persons residing or doing business in other States, taxing the mere act of so soliciting, when the property had not arrived in the State. Here the party was in the State, perhaps a part of its population, traveling with the machines in his possession, inside the state, obtained from the store-house of the company at Parkersburg, in this State. * * * Justice Bradley, as I think, appears from the above extracts from his opinion has in mind and hand the case of drummers selling by sample for principals in other States, who solicit orders for the sale of property not yet in the State. As the attorney-general argues, I think "Robbins v. Taxing Dist. merely deals with a tax on a drummer selling by sample, and not with a man carrying goods with him for delivery as he sells, as in our case." I do not understand that high and able tribunal, the Supreme Court of the United States, to have gone to the extent claimed by the defense in this case, or to have denied the power to impose the license taxes where they do not directly affect interstate commerce, or the right to

tax salesmen having their goods in the State, and selling them, simply because, in instances, such goods are manufactured in or sold by owners residing in other States. No one will be more ready than I to accord to the constitution and laws of the United States their pre-eminence where I can see the conflict of State law with it; but I do not realize it in this case, nor do I construe the case of Robbins v. Taxing Dist. as operating to invalidate the statute of the State in question.

AN interesting question as to the priority of a chattel mortgage over a lien was decided by the Supreme Court of Tennessee in McGhee v. Edwards, 11 S. W. Rep. 316. There it was held that a recorded chattel mortgage on a horse is superior to a subsequent lien of a livery stable keeper acquired under the statute, where the horse is placed in the stable after the making of the mortgage without the knowledge of the mortgage, though the stable keeper had no notice in fact of the mortgage. The court says:

Mr. Jones, in his late work on Liens, with the adjudged cases on both sides of the question before him, says, (section 691:) "A chattel mortgage upon a horse is superior to a subsequent lien of a stable keeper, where the horse is placed in the stable by the mortgagor, after the making of the mortgage, without the knowledge or consent of the mortgagee;" citing therefor Jackson v. Kasseall, 30 Hun. 231; Bissell v. Pearce, 28 N. Y. 252; Charles v. Neigelsen, 15 Ill. App. 17; Sargent v. Usher, 55 N. H. 287; Bank v. Lowe, (Neb.) 33 N. W. Rep. 482. The learned author adds: "It is not to be supposed that a statute giving a lien for the keeping of animals was intended to violate fundamental rights of property by enabling the possessor to create a lien without the consent of the mortgagee, when the person in possession could confer no rights as against the mortgagee by a sale of the animals. The keeper of animals intrusted to him by the mortgagor undoubtedly acquires a lien as against the mortgagor, but it is a lien only upon such interest in them as the mortgagor had at the time, and not a lien as against the mortgagee, between whom and the keeper of the animals there is no privity of contract. The mortgagor, though in possession, is in no sense the mortgagee's agent; nor does he sustain to the mortgagee any relations which authorize him to contract any liability on his behalf. The statute cannot be construed to authorize the mortgagor to subject the mortgagee's interest to a lien without his knowledge or consent, as security for a liability of the mortgagor, unless such a construction clearly appears from the language of the statute to be unavoidable." As stated in the outset, authorities are to be found holding a contrary view. See Case v. Allen, 21 Kan. 217-220; Smith v. Stevens, 36 Minn. 303, 31 N. W. Rep. 55,—which were cases where an agister's lien was held superior to an older registered mortgage. But their reasoning does not commend them to us sufficiently to shake our convictions that the other view is the sounder and better.

STIPULATIONS FOR ATTORNEY'S FEES IN PROMISSORY NOTES.

Three objections have been urged against a stipulation in a promissory note for the payment of "such additional sum as the court might adjudge reasonable as attorney's fees," in case suit or action should be instituted to collect said note or any portion thereof. These objections are as follows:

1st: It has been claimed that such stipulation was usurious;

2d: That it rendered the note non-negotiable; and

3d: That it was contrary to public policy, without consideration and void.

First: The claim that such a stipulation renders the transaction usurious is without foundation in law or fact. The contract is to pay damages for the non-payment of the note at maturity, in the event the holder thereof shall be compelled to bring an action to collect the amount due, and the amount of damage must be ascertained and determined by the court, and is to be such sum as the court may adjudge reasonable "as attorney's fees" in the action. This damage is not paid to the creditor directly. It is true that he indirectly receives the benefit of it, but it is paid to the attorney, and the creditor only receives the rate of interest contracted to be paid by the debtor. If there was no agreement by the debtor for the payment of an attorney's fee and the creditor was compelled to sue, the debtor, it is true, would pay the contract rate of interest, but the creditor would not receive that amount. He would receive the amount due him, less the amount he would be required to pay his attorney for collecting the same. Thus, if the note be for $1,000.00 and interest at the rate of ten per cent. per annum from its date until paid, and be collected by an attorney at the end of the first year and the attorney charges a commission of ten per cent. on the amount collected, the debtor pays $1,100.00, but the creditor only receives $990.00. Therefore the creditor has not only failed to receive any interest for the money loaned, but has also, in order that he might not lose the whole amount, been compelled to pay out $10.00 of the principal sum. He is, therefore, $10.00 worse off than he was before he loaned the money, while, if he could have recovered a

reasonable attorney's fee, he would have received the interest to which he was justly entitled.

The borrower, by complying promptly with the terms of his contract and paying the amount due in accordance with his agreement, can always avoid the payment of such damages, and it is his sole fault if the lender be compelled to sue and enforce payment by legal means. He is the only one to blame for the breach of the contract and, if the lender is damaged thereby, he should in equity pay the damage sustained.

In Smith v. Silvers,[1] the court say: "A stipulation whereby the debtor agrees to be liable for reasonable attorney's fees in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it."

And in Parham v. Pulliam,[2] the court say: "The contract of the debtor to pay the attorney's commission, in case of suit upon default of payment of the debt for the prescribed time, adds nothing to the amount of interest to be paid to the creditor. If the debtor pays the ten per cent. interest stipulated, and also pays the attorney's commissions, the creditor has received no more than the ten per cent. interest. If he does not pay the attorney's commissions the creditor receives to that extent less than the ten per cent. interest."

In Huling v. Drexel,[3] the court say: "The contract here has nothing in it oppresive to the borrower; it is advantageous to the borrower and lender when merely intended to enforce a punctual performance of the contract; nor is there the slightest pretense to say that it is intended as a cover to usury. A failure on the part of the borrower puts nothing in the pocket of the lender; on the contrary the probability is that he will not be reimbursed the expenses which he may incur. With such stipulations, which are frequently made, persons may borrow money at a less rate of interest, as punctuality is always taken into consideration in fixing the terms of a loan." To the same effect are the cases cited below.[4]

[1] 32 Ind. 321.
[2] 5 Coldwell (Tenn.), 407.
[3] 7 Watts, 126.
[4] Clawson v. Munson, 55 Ill. 394; McGill v. Griffin, 32 Iowa, 445; McIntyre v. Cagely, 37 *Id.* 676; McAllister's Appeal, 69 Pa. St. 204; Miner v. Paris Exchange Bank, 53 Tex. 559; Wilson S. M. Co. v. Moreno, 6 Sawyer, 35; Gaar v. Louisville Banking Co., 11 Bush, 189; Imler v. Imler, 94 Pa. St. 372; Weatherby v. Smith, 30 Iowa, 131; Siegel v. Drumm, 21 La. Ann. 8.

As early as 1846 the Supreme Court of Indiana held: "As to the objection of usury in the mortgage, it is sufficient to answer that, so far as regards the ten per cent., that was the lawful rate of interest when the contract was made; and, so far as regards the five per cent. damages contingent upon the sale of the premises under the power given in the mortgage, it was entirely optional with the mortgagor whether he would pay them or not. They were in the nature of a penalty for the want of punctuality in paying the debt when due. This saves the contract from the taint of usury.[5] Besides, the five per cent. seems to have been intended as a compensation for the trouble of selling the mortgaged premises on default of the mortgagor in paying the debt. This, we think, is a reasonable stipulation to allow compensation for extra and incidental trouble and expense, and does not, in our opinion, render the contract usurious."[6] [7]

The same reasoning applies with equal effect to the attorney's fee stipulation in a promissory note; but the Supreme Court of Ohio, in the case of the State of Ohio v. Taylor, say:[8] "It must be admitted, if this agreement can be enforced, the statutes of Ohio regulating the rate of interest, whether upon loans by the fund commissioners or in other cases, are at once virtually repealed. The statute passed on March 28, 1837, provides that the fund commissioners, in a certain event, may loan the money to individuals at a rate of interest not exceeding seven per cent. Seven per cent. is the maximum of interest the commissioners are authorized to contract for or receive for the forbearance of their loans. They are prohibited from receiving more, in fact, in express terms—that is, as interest. It is said, however, that the five per centum in this case is, by the agreement of the parties, to be added to the seven per cent., not as interest, but as costs, agreed upon as such, for collection by the parties.

[5] Wells v. Girling, Brod. & B. 447.
[6] Baynes v. Fry, 15 Ves. 120.
[7] Gambril v. Rose, 8 Blackf. 140, 44 Am. Dec. 760.
[8] 10 Ohio, 378. See also Dow v. Updyke, 7 N. W. Rep. 857, 11 Neb. 95.

Now it seems to be of little consequence in this case what this five per cent. may be called, but the inquiry is, what is the thing itself? However it may be designated. it is very clear to us it is a mere shift or device, by which twelve per cent. is retained as interest upon this loan, and in this view of the case cannot be enforced."

The Supreme Court of Oregon, after reviewing the foregoing authorities, said: "And the only question involving any serious difficulty, it seems to us, is whether such engagements are opposed to the policy of the statute against usury. If the effect of enforcing them would be to give the lender a larger compensation for the loan and use of his money than such statute allows, then they should be held usurious and void. But while the lender has no lawful right to contract with the borrower for a rate of interest exceeding the limit imposed by the statute, he is not debarred from requiring as a condition of making the loan that he shall be secured in such a way as will enable him to receive the principal of the loan and the amount of lawful interest stipulated for, without further loss or expense occasioned by the default of the borrower." [9]

It would seem, therefore, that the great weight of authority holds such stipulations to be free from the taint of usury.

Second. It is claimed that such stipulations destroy the negotiability of a promissory note; and in Woods v. North,[10] the Supreme Court of Pennsylvania say: "Interests and costs of protest after non-payment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not alter its negotiability, neither does a clause waiving exemption, for that in no way touches the implicity and certainty of the paper. But a collateral agreement as here, depending, too, as it does upon its reasonableness, to be determined by the verdict of a jury, is entirely different. It may well be characterized like an agreement to confess a judgment was by Chief Justice Gibson, as luggage, which negotiable paper, riding, as it does, on the wings of the wind, is not a courier able to carry. If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contention and litigation result."

It seems to me that a stipulation in a promissory note for the payment of a reasonable attorney's fee is the very class of luggage which would enable the holder to negotiate it the more easily. One would purchase more readily and pay more for a promissory note, which held the maker liable for the costs of collection, than for one the cost of collecting of which he would himself be compelled to pay.

In First National Bank of Trenton v. Gay,[11] the note sued on contained a stipulation for the payment of attorney's fees, and had been transferred to the plaintiff, but the court held: "For the reason that the instrument in suit is not precise as to the amount to be paid, we do not regard it as a promissory note. And no little stringency is exhibited by the cases in respect to this point. It is said that the sum must be stated definitely, and must not be connected with any indefinite or uncertain sum, and that the rule *Id certum est*, etc., is not allowed to supply any lack in this particular." And the instrument was held not to be negotiable.

I understand a promissory note to be a legal promise in writing for the payment within a certain time of a certain sum of money, in which the maker and payee are designated with sufficient certainty.[12]

The note last above referred to, with the exception of the stipulation as to the attorney's fee, read as follows:

"$650.00. TRENTON, Mo., May 13, 1874.

Ninety days after date we promise to pay to the order of Robert L. Gillilan, six hundred and fifty dollars, with interest after maturity at the rate of ten per cent. per annum, at the First National Bank of Trenton, Mo.," and was signed, "Nathan Gillilan. Samuel Gay."

Thus far we have a "legal promise for the certain payment of a certain sum of money." This constituted the note, and no stipulation added thereto that the makers would pay an additional sum as a penalty, or as liquidated damages, in the event of the happening of some contingency after its maturity, could, by any possibility, change or alter the legal

[9] Peyser v. Cole, 11 Oreg. 39.
[10] 21 Am. Rep. 214, *note*.
[11] 63 Mo. 33, 21 Am. Rep. 430.
[12] 1 Parson's on Bills and Notes, 23.

effect thereof. The promise was to pay a certain sum to a certain person at a certain time and place, and there was then the further agreement that, in the event this promise was broken and the holder of the note thereby compelled to institute legal proceedings for the recovery of the amount due, the promissor would pay the expense incurred; but there was an unconditional promise to pay a certain sum at all events.

Again, in Jones v. Radatz,[13] the court say: "The suggestion in some of the cases,[14] that a stipulation to pay attorney's fees in case of suit relates merely to the remedy, is not sound; for the payee, if he recover on that part of the promise, must recover, not because he is obliged to bring suit, but because it is part of the contract and obligation of the maker, on which the suit is brought, that he will pay them upon the specified contingency. Those cases, and Gaar v. Louisville Banking Co.,[15] appear to advance the proposition that a note may be negotiable if the amount with which it may be discharged at maturity, or recoverable upon it in an action, be entirely indefinite and uncertain. We think the certainty requisite to the negotiability of the instrument must continue until the obligation is discharged, and that any provision which, before that time, removes such certainty, prevents the instrument being negotiable at all. The stipulation in this instrument for the payment of reasonable attorney's fees introduced into the obligation an element of uncertainty, which prevented the instrument being a negotiable note." [16]

On the other hand, it is held that such a stipulation does not render the note non-negotiable. Thus, in Trader v. Chichester,[17] the court say: "Thus far we have proceeded upon authority. But on principle the stipulation for an attorney's fee ought not to effect the negotiability of a note. The principal and interest is the sum due upon the note at maturity, and by the payment thereof, it will be fully satisfied. And it is only in case of default of such payment, and after the note is overdue, and lost its negotiable character, that the penalty or attorney's fee can be claimed or collected at all. In fact, the stipulation, although contained in the note, is, strictly and properly speaking, no part of it, but is a distinct contract, collateral thereto, as much as if it was written on a separate piece of paper."

In Stoneman v. Pyle,[18] the court say: "But as the note was payable at a bank in this State, it is governed by the law merchant, and the holder thereof is entitled to all the rights of a holder of commercial paper, unless the clause in the note stipulating for the payment of attorney's fees, in case suit should be commenced thereon, takes it out of that class of paper. It is earnestly urged by counsel for appellee, that the provision above indicated makes the amount of the note uncertain, and therefore that it does not come within the legal requirements of commercial paper. It may be conceded that a note, in order to be placed upon the footing of bills of exchange, must be for a sum certain; for in no other way can the maker know precisely what he is bound to pay, or the holder what he is entitled to demand. But the note in question, if paid at maturity, or after maturity, but before suit is brought thereon, is for a sum certain. On the maturity of the note the maker knew precisely what he was bound to pay, and the holder what he was entitled to demand. In the commercial world commercial paper is expected to be paid promptly at maturity. The stipulation for the payment of attorney's fees could have no force except upon a violation of his contract by the defendant. Had the defendant kept his contract and paid the note at maturity, or afterwards, but before suit, he would have been required to pay no attorney's fees, nor would there have been any difficulty as to the extent of his obligation." [19]

[13] 27 Minn. 240.

[14] Sperry v. Horr, 32 Iowa, 184; Seaton v. Scovill, 18 Kas. 433.

[15] 11 Bush, 180.

[16] See also, to the same effect, the cases cited in the note below: Morgan v. Edwards, 11 N. W. Rep. 21, 33 Wis. 599; Garretson v. Purdy, 14 N. W. Rep. 100; First Nat. Bank v. Larsen, 19 N. W. Rep. 67, 60 Wis. 206; Johnston v. Speer, 92 Pa. St. 297, 37 Am. Rep. 675; Maryland Fertilizing and Manufacturing Co. v. Newman, 60 Md. 584, 40 Am. Rep. 750; Altman v. Rittershafer (Mich.), 36 N. W. Rep. 74; Altman v. Fowler (Mich.), 37 N. W. Rep. 708.

[17] 41 Ark. 242, 48 Am. Rep. 38.

[18] 35 Ind. 103, 9 Am. Rep. 637.

[19] Smock v. Ripley, 62 Ind. 81; Brown v. Barber, 59 *Id.* 533; Garven v. Pontius, 66 *Id.* 192; Tuley v. McClung, 67 *Id.* 10; Hubbard v. Harrison, 38 *Id.* 328; Stroup v. Gear, 48 *Id.* 100; Wyant v. Pattorf, 37 *Id.* 513; Smith v. Muncie Nat. Bank, 29 *Id.* 258; McGill v. Griffin, 32 *Id.* 445; Sperry v. Horr, 32 Iowa, 184; Nickerson v. Sheldon, 33 Ill. 372; Dietrich v. Bayley, 23 La. Ann. 767; Seaton v. Scovill, 18 Kas. 435; Gaar v.

Those cases, also, which hold that the agreement to pay a reasonable attorney's fee is contrary to public policy and therefore void, hold substantially that such provision does not affect the negotiability of the note.[20]

Third. It has been claimed that such stipulation is contrary to public policy, without consideration and void.

In Bullock v. Taylor,[21] Cooley, J., speaking for the court says: "A stipulation for such a penalty we think must be held void. It is opposed to the policy of our laws concerning attorney's fees and it is susceptible of being made the instrument of the most grevious wrong and oppression. * * * The provision in these notes is as much void as it would have been had it called for the sum imposed by its true name of penalty or forfeiture. There is no consideration whatever that can support it."

The foregoing opinion applied, however, to notes where the stipulation was to pay a specified sum as attorney's fees. Where the agreement is to pay such sum as the court may adjudge reasonable, the amount to be recovered will be determined by the evidence in the case, just as any question of damage or loss must be determined; and, in such case, the stipulation is not "susceptible of being made the instrument of the most grievous wrong and oppression," but the court will see that no unfair advantage is take nor wrong perpetrated in adjudicating the sum to be recovered.

In a case somewhat similar to the Michigan case above referred to, where the attorney's fee stipulated for was twenty per cent. of the amount due on the note, the Supreme Court of Oregon said: "Objection is made by the appellants to the allowing of $200.00 as attorney's fees in this suit for foreclosing the mortgage. That allowance was based on a provision in the mortgage providing for counsel fees of twenty per cent. on the amount due in case of a suit, whether judgment should be recovered or not. In Peyser v. Cole,[22] this court considered the question of attorney's fees arising on contracts providing for reasonable attorney's fees and sustained their legality; but we do not feel disposed to extend the doctrine there announced beyond the precise question then before the court. But the question there considered does not exclude the one at bar. We are, therefore, at liberty to consider it, uninfluenced by any thing that was said in that case."[23]

And, after quoting from the Supreme Court of Michigan,[24] the Oregon court then say: "Counsel for the respondents suggested upon the argument that if the court deemed the amount specified in the mortgage as attorney's fees to be unjust or unreasonable, that the same might be reduced to such sum as we might think, under all the circustances, would be proper. This, in effect, is asking the court to make a contract for the parties that they have not made themselves, and which we do not consider we are authorized to do. We must either enforce this contract as it appears, as to this item, or decline to enforce it. * * * Peyser v. Cole, *supra*, has gone as far on the subject of allowing attorney's fees as is consistent with our views of the best considered cases." This holding was affirmed by the same court in Kimball v. Moir.[25]

On the other hand, in Weatherly v. Smith,[26] where the contract was to pay a reasonable attorney's fee, the court say: "The contract to pay a reasonable attorney's fee, not being usurious, upon what principle should it be disallowed? Why cannot a party by his contract solemnly entered into for the sale of land, or for the loan of money, legally bind the other party to pay him a sum that will indemnify him against actual expenses which he may have to pay out to collect his debt, and which could be avoided by prompt payment by the debtor? We can see no good reason why this may not be done."

And I have no hesitation in saying that no court has ever given, or can ever give, any good reason for disallowing a reasonable attorney's fee, in the event of suit brought to

Louisville Banking Co., 11 Bush, 180; Witherspoon v. Musselman, 14 Bush, 214, 29 Am. Rep. 204; Howenstein v. Barnes, 5 Dillon, 484; Bank of British North America v. Ellis, 6 Sawyer, 96; Heard v. Dubuque Co. Bank, 8 Neb. 10; Dow v. Updyke, 11 *Id*, 95.

[20] Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; Myer v. Hart, 40 Mich. 517.

[21] *Supra*.

[22] 11 Oreg. 39.

[23] Balfour v. Davis, 14 Oreg. 47.

[24] Myer v. Hart, *supra*.

[25] 15 Oreg. 427. The cases of Burns v. Scoggin, 9 Sawyer, 73, and Daily v. Maitland, 88 Pa. St. 384, hold a contrary doctrine.

[26] 30 Iowa, 131, 6 Am. Rep. 663.

collect a note, where such fee is stipulated for by the parties. The law frequently awards damages for the breach of a contract, when the parties have not contracted to pay damages for such breach, why, then, should it refuse to adjudge such damages when it has been expressly stipulated that they should be paid?

The Supreme Court of Pennsylvania, in Daly v. Maitland,[27] say: "It is undoubtedly true that the parties to a contract may lawfully agree that the damages in case of a breach shall be liquidated at a certain amount. Equity will not relieve against such a contract, fairly entered into, unless it is evidently a penalty."

In Wilson S. M. Co. v. Moreno,[28] Deady, J., says: "An agreement by a debtor to pay a reasonable attorney's fee in case his creditor is compelled to incur the expense of an action to collect the debt is only an agreement to so far reimburse the creditor the loss which he may sustain by reason of the debtor's failure to perform his contract to pay his debt. In justice and fairness it stands on as high a ground as the right to recover damages for the non-performance of any contract—such as to deliver grain or goods at a certain time and place." These views are fully sustained by the authorities cited below.[29]

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[27] 88 Pa. St. 384, 32 Am. Rep. 457.

[28] 6 Sawyer, 35, 38.

[29] Johnson Harvester Co. v. Clark, 30 Minn. 308; Bank of British North America v. Ellis, 6 Sawyer, 96, where it is said: "A stipulation in a negotiable instrument for an attorney's fee, which, in effect, provides for the payment of certain expenses of collection in case the same is not paid without suit, so far gives security and currency to such instrument, and is, therefore, to be regarded with favor as being a just and convenient means of promoting the general object and utility of the same;" and it was there held that an indorser was liable to a subsequent holder for a reasonable attorney's fee for collecting the note. Howenstein v. Barnes, 8 Reporter, 326, 9 Cent. L. J. 48; Robinson v. Loomis, 1 P. F. Smith, 78; McAllister's Appeal, 9 *Id.* 204; Mahoning Co. Bank's Appeal, 8 Casey, 158; Stoneman v. Pyle, 35 Ind. 104; Smith v. Silvers, 32 *Id.* 321; Tuley v. McClung, 67 *Id.* 10; Billingsley v. Dean, 11 *Id.* 351; Churchman v. Martin, 54 *Id.* 387; Clawson v. Munson, 55 Ill. 394; McIntyre v. Cagley, 37 Iowa, 676; Davidson v. Vorse, 52 *Id.* 384; Nelson v. Everett, 29 *Id.* 184; First Nat. Bank v. Breese, 39 *Id.* 640; Siegel v. Drumm, 21 La. Ann. 8; Dietrich v. Bayley, 23 *Id.* 767; Nickerson v. Sheldon, 33 Ill. 372; Salem Farmers' Nat. Bank v. Rasmusser, 1 Dak. Ter. 60; Heard v. Bank, 8 Neb. 10; Kemp v. Claw, 8 *Id.* 24; Schmidt & Friday's Appeal, 1 Norris, 524; Miner v. Paris Exchange Bank, 53 Tex. 561; Cox v. Smith, 1 Nev. 161; McLane v. Abrams, 2 *Id.* 199; Thalen v. Duffy, 7 Kas. 405; Sharp v. Baker, 11 *Id.* 381; Whitmore v. Reynolds, 46 Cal. 380; Bowie v. Hall (Md.), 16 Atl. Rep. 64.

CONTRACTS—ILLEGALITY—ATTORNEY AND CLIENT.

BOWMAN V. PHILLIPS.

Supreme Court of Kansas, April 5, 1889.

A contract was entered into between certain attorneys and other parties, whereby for a monthly compensation, payable monthly for the period of one year, said attorneys agreed to defend said parties, and all others who joined their association, in all suits which might be brought against them for violation of the prohibitory liquor laws. Such monthly compensation was paid for nine months, and suit was brought for the failure to pay the same during the last three months. *Held*, that the contract was against public policy and void, and the parties would be left as the law found them.

VALENTINE, J., delivered the opinion of the court:

This action was commenced by C. S. Bowman and Charles Bucher, partners as Bowman & Bucher, and J. W. Ady, against W. H. Phillips, James L. Serviss, G. W. Rogers, and George E. Clark to recover from the defendants the sum of $240, alleged to be due for professional services rendered by the plaintiffs as attorneys and counselors at law. The case was tried before the court without a jury, and judgment was rendered in favor of the defendants and against the plaintiffs for costs, and the plaintiffs, as plaintiffs in error, bring the case to this court for review. It appears that on May 5, 1883, a society existed at Newton Kan., composed of the defendants and others, known as the "Saloon and Druggists' Protective Association of Newton, Kansas." The members of the association were principally saloon-keepers, and were engaged in selling intoxicating liquors in violation of the prohibitory liquor law, and the principal object of the association was to frustrate the law to the extent of evading all punishment for its violation. The plaintiffs in this case had full knowledge of all these things. On that day the plaintiffs and the defendants, with a few others, entered into the following written contract to-writ:

"NEWTON, KANSAS, May 5, 1883.

"We, the undersigned, business men of the city of Newton, agree to pay Mess. Bowman & Bucher and J. W. Ady the sum of eighty dollars per month on the 1st day of each month for the period of one year, from May 1, 1883, eighty dollars to be paid on the execution hereof. Said payments to be made in consideration of the services herein agreed to be rendered.

"We, the undersigned, attorneys at law, agree to defend all cases that may be brought against Geo. E. Clark, Jas. Serviss, W. H. Phillips, J. E.

Marti, J. H. Gray, J. H. Pappe, O. S. Bassett, E. Wetzell, and any others, who may become members of the Saloon and Druggists' Protective Association of Newton, Kansas, or any person in business with either of them, as clerk, partner, or otherwise, for a violation of the prohibitory liquor laws of the State of Kansas, and to accept as full compensation for our services the sums hereinbefore stipulated to be paid. This is not to include the necessary expenses or outlays on our part, should such be necessary, but only fees for professional services. Executed in duplicate. [Signed]

"JAS. L. SERVISS.	BOWMAN & BUCHER.
"W. H. PHILLIPS.	J. W. ADY.
"J. H. PAPPE.	GEO. E. CLARK.
"J. E. MARTI.	G. W. ROGERS.
"L. H. CRAFTS.	

"Sept. 1st."

Afterwards, and within one year thereafter, various criminal prosecutions were instituted and conducted against the several members of the aforesaid "Saloon and Druggists' Protective Association," for violation of the prohibitory liquor law, and the plaintiffs in this action, as attorneys and counselors at law, defended them. Also, during that year, and for the services of the plaintiffs for the first nine months thereof, the members of said association paid to the plaintiffs the sum of $720, leaving, as the plaintiffs claim, still due to them on the aforesaid contract and for their services for the last three months of the aforesaid year, the sum of $240, for which sum they brought this action. It is stated in the briefs of counsel that the court below decided this case upon the theory that the aforesaid contract was in violation of public policy, and therefore void, while the plaintiffs claim that the contract is not in violation of public policy, nor void for any other reason; and they further claim that, even if the contract is void, still they alleged enough in their petition, and proved enough on the trial, to enable them to recover in the action as upon an implied contract for the actual services which they in fact performed. They certainly proved that the services which they actually performed were worth more than $960, which is all that they claim for the entire year's work.

We think the contract is against public policy, and void. Of course, attorneys at law may be employed to defend persons charged with crime, where the alleged offenses are charged to have been committed prior to the employment. An attorney's services may also be engaged for future transactions, where no wrong is intended or contemplated; and in all cases good faith and innocence will be presumed until the contrary appears. Also, where a contract is not in violation of public policy, nor in any manner tainted with immorality or illegality, and services are performed or benefits conferred under it, but the contract, is void because of some want of power in one or both the parties to make it, or void because of some irregularity in its execution, a contract will be implied, and a promise assumed, that the party benefited shall pay for all benefits which he has actually received under the void contract. Or, if no contract is expressly made, but services are nevertheless performed, or benefits actually conferred with the knowledge and consent of the other party, and not as a gratuity, which services or benefits are in and of themselves innocent and proper, a contract and promise will be implied to pay for all the benefits actually received. But none of these cases is the present case. In the present case it was future wrongs and violations of law that were contemplated when this contract was executed, and it was future wrongs and violations of law that were to furnish the foundation for the plaintiff's services, and the foundation for their compensation, and, except for these contemplated future wrongs and violations of law, the contract would never have been made. This contract was tainted at its inception with these future intended and contemplated violations of law. Of course, the plaintiffs, when they entered into the contract, did not intend to perform services different from services which may rightfully and legally be performed under a contract made for similar services after the violations of the law have actually occurred, and the plaintiffs, in rendering their services under this contract, did not render any services except such as they might have legally and rightfully rendered under a contract made after the violations of the law had actually taken place. But these things are not the things which render the contract in this case objectionable. The wrong on the part of the plaintiffs consisted simply in entering into a contract to defend persons for criminal offenses which were, in contemplation of all the parties, to be committed in the future. This was a virtual encouragement of the defendants to violate the law, and surely the defendants expected by future violations of the law, to furnish plaintiffs a sufficient amount of work to make the plaintiffs earn the agreed compensation; and in all probability the defendants also expected to realize a sufficient amount of profits out of their illegal and interdicted traffic to pay the plaintiffs, and have something left. It was evidently considered by the parties as a mere sharing of the profits. The evidence tends to show that the defendants employed the plaintiffs in advance, because they believed that by so doing they could better evade the prohibitory liquor law, and could obtain the services of the plaintiffs at a cheaper rate, provided they continued to carry on their illegal traffic. If the plaintiffs had refused to enter into such a contract, possibly the defendants would have closed their illegal business at once. What operated upon the minds of the plaintiffs to enter into this contract, in advance of the commission of the contemplated offenses, is not shown, but it is open to the supposition that they may have believed that, if they did not enter into this contract, the defendants would close their illegal

business, or, at least, would not commit so many violations of law, and thereby would render the plaintiff's services and their compensation correspondingly lighter. The defendants, by this contract, agreed to pay the plaintiffs $80 per month, and they did in fact pay them that amount for the first nine months of their employment, and failed to pay them only for the last three months. It must also be remembered that the plaintiffs in this action are attorneys and counselors at law. They belong to a class of persons who are authorized and licensed under the laws of Kansas to assist the courts in the administration of justice, and in enforcing the laws. Now, is it proper for such persons to say to persons who are contemplating the commission of crime: "If you commit the crime, we will defend you, and are ready now to enter into a contract for that purpose?" Attorneys at law, above all others, should refrain from doing anything which might seem to encourage a violation of the laws. We know of no authorities directly and precisely in point as to the questions involved in this case, but we cite the following as giving support to the views herein expressed: Treat v. Jones, 28 Conn. 334; Arrington v. Sneed, 18 Tex. 135; Hayes v. Hayes, 8 La. Ann. 468; 3 Amer. & Eng. Encyclop. Law, 869, 875, 886, and cases there cited; 7 Wait, Act. & Def. c. 31; Greenh. Pub. Pol. pts. 11, 13. As above stated, we think the contract in question in this case is void for the reason that it contravenes public policy, and we also think that the plaintiffs cannot recover for their services which they actually performed under the contract, and this for the same reason. As between the original parties, and all persons *in pari delicto*, the courts will not enforce illegal contracts, nor any supposed rights founded upon them, but will leave the parties, and those *in pari delicto*, just where they find them, and leave each in the possession of just what he has obtained. So much of the contract, or its fruits, as has already been executed, performed, or vested, the courts will permit to stand, but whatever remains to be executed or performed, or to become vested, the courts will not enforce. In the present case, the plaintiffs will retain all the money which they have received under the void contract without the defendants having any action to recover it back, and the defendants will retain all the benefits resulting from the services of the plaintiffs which have already been rendered under the void contract, without the plaintiffs having any action to recover for the value of such services. Indeed, except for the contract there might never have been any necessity for the performance of any such services, for without the encouragement given by the contract to the defendants they might never have violated any of the laws of Kansas. We think the decision of the court below is correct, and its judgment will be affirmed. All the justices concurring.

NOTE.—As the court says in the principal case there seem to be no cases which are exactly like that case, though two of the cases cited refer to services rendered by attorneys. To induce a party to engage in a riot, an attorney promised to defend him against the expected prosecution. The court held, that the attorney could not maintain a suit for the value of his services, since the contract originated in his own illegal instigation to the commission of a crime, which without that instigation might never have been committed, and so no occasion for the plaintiff's services would have arisen.[1] So a contract, the consideration of which was such advice to a party as was calculated to enable, if not to induce, him to elude the process of the law, and such advice to the officer intrusted with the execution of process as was calculated to induce him to violate his duty, cannot be sustained.[2] But the general principles applying to such contracts are well settled. Contracts, which tend to obstruct or impede the administration of justice, are null and void.[3] In reference to such contracts the courts leave the parties as they find them, when they are *in pari delicto;*[4] but a recovery is often allowed when the parties are not *in pari delicto*, the party seeking assistance being the victim of duress, fraud or superior influence.[5]

It was formerly held, that A could not sue on a contract with B, if he knew that B intended to avail himself of the proceeds or result of such contract to do an illegal act. This rule was frequently asserted in the case of the sale of goods. It is now held, that A can recover on such contract, unless he participates in such illegal enterprise.[6] It is sometimes said there must be complicity in the performance of the illegal act,[7] or a combination to effect such illegal purpose.[8] Where, however, the contract is so connected with the illegal transaction or purchase as to be inseparable from it, the contract cannot be enforced.[9] A and B carried cotton between the lines of the two armies during the late war, which was contrary to law. They employed C to haul it. C was not allowed to maintain a suit for his services.[10] A could not recover from B for his services in assisting B in managing a lottery, lotteries being prohibited.[11] A printed a copyrighted book for B, knowing that B intended to violate the copyright law, which forbid anyone but the author from printing a copyrighted book. A was not allowed to recover against B for his services.[12] A carpenter was denied compensation for his services in building a nine-pin alley for a public house keeper, the law forbidding the keeping of such alleys.[13]

In order, however, to make a contract unlawful as against public policy or law, it must be manifestly and directly so. It is not sufficient, that the contract is connected with some violation of the law, however re-

[1] Treat v. Jones, 28 Conn. 334.
[2] Arrington v. Sneed, 18 Tex. 135.
[3] Herman v. Zeuchner, 21 Cent. L. J. 387; 2 Addison on Contracts (ed. of 1888), 1141; Collins v. Blantern, 2 Wils. 349.
[4] 2 Addison on Contracts (ed. 1888), 1172; 2 Wharton on Contracts, §§ 336, 352, 340.
[5] 1 Wharton on Contracts, § 353.
[6] Gaylord v. Soragen, 32 Vt. 110; Green v. Collins, 3 Cliff. 494; Bishop v. Honey, 34 Tex. 245.
[7] Hill v. Spear, 50 N. H. 253; Whitlock v. Workman, 15 Iowa, 351; Kottwitz v. Alexander, 34 Tex. 690.
[8] Tatum v. Kelley, 25 Ark. 209; Aiken v. Blaisdell, 41 Vt. 655; Lewis v. Alexander, 51 Tex. 578; 1 Wharton on Contracts, § 343; Adams v. Coulliard, 102 Mass. 167.
[9] Tatum v. Kelly, *supra*.
[10] Williams v. Gay, 21 La. An. 110.
[11] Davis v. Caldwell, 2 Rob. (La.) 271.
[12] Nichols v. Ruggles, 3 Day (Conn.) 145.
[13] Spurgeon v. McElwain, 6 Ohio, 442.

motely or indirectly.[14] It is held, that where a party contracts to furnish an article, which has only an unlawful use, he is presumed to know thereof, and he cannot enforce his contract. When the article has a lawful use, he is not presumed to know that it will be used unlawfully, and may enforce his contract.[15] The same rule has been applied according to the legality or illegality of the ordinary use of such article.[16]

The contract in question is apparently an innocent one. It is a contract to act for parties in suits that may arise against them under laws which are novel, imposing new provisions of questionable constitutionality. We do not see why, in good faith, such contracts cannot be made. It is a common practice to engage lawyers in advance to attend suits that may be brought against parties, and for convenience and economy several persons unite in such contract of employment. In this case, the court has, by parol testimony or common reputation, "annexed incidents" to this contract. It is implied in the opinion that there can be no such thing as a legal sale of liquors by a druggist or a saloon keeper, that all defenses in suits under their prohibitory liquor laws must be made merely to evade deserved punishment, and that there is no room to question the legality of any of the provisions of those laws. In such case, under the prior decision, there being no occasion for such legal services but an unlawful one, the contract in suit may be held to be void. The idea, that this contract was considered "a mere sharing of the profits," seems to be far-fetched. There are other statements which are assumptions or presumptions, and hardly strengthen the argument. Unfortunately for the weight of this decision, all questions relating to prohibitory liquor laws have, in Kansas, assumed a political tinge.

S. S. MERRILL.

[15] Brunswick v. Valleau, 50 Iowa, 120.
[16] Spurgeon v. McElwain, 6 Ohio, 442.
[14] Bier v. Dozier, 24 Gratt. (Va.) 1.

JETSAM AND FLOTSAM.

A CHILD BRINGS SUIT FOR INJURIES SUFFERED BEFORE ITS BIRTH.—A novel suit has been brought in the Philadelphia common pleas court. It is probable that the records might be searched in vain for a case like it. It is no less than a suit by an infant in arms against a street railway company to recover damages for injuries received before it was born.

The mother of the child was a passenger and received spinal injuries from the jolt of the car, which had come into collision with a wagon. About six months after the accident the child was born. Since birth the child has been afflicted with epilepsy, and it is the opinion of two physicians of high standing that the disease is traceable to the injury which the mother received. It is for this reason that suit has been brought on behalf of the child. Whether such a suit can be maintained is a highly interesting question, and the decision of the court will be looked for with interest by lawyers. The law is clear that an inheritance will attach to an unborn child, and that such child, after birth, can bring suit for the possession of the inheritance, but whether such child can bring suit for any other purpose is the novel point to be decided, and is one upon which the law books seem to be silent.

UNCONSTITUTIONAL EMBARGO.—The Indiana legislature at its last session passed an act forbidding the piping of natural gas to points outside the State. The reason given was that it was not certain how long the supply would last, and that Indiana ought to have the benefit of it while it still held out. It was much as if Pennsylvania should forbid the exportation of anthracite, or Michigan salt or iron ore. It was understood at the time the law was passed that its constitutionality would soon be tested, and it has been. A company having begun piping gas into Ohio, suits were brought to stop it. The State circuit court held the act was unconstitutional since it was in conflict with the power to regulate commerce between the States which had been conferred on congress. The case will go at once to the State supreme court, which will doubtless affirm the decision.

A NICE DISTINCTION.—Not long ago an English court decided, and justly, without doubt, that after a convict has served his term and been discharged—and the same principle would apply to a pardon—it is a libel to write of him as "a felon." In Missouri it has now been held that a charge that plaintiff has been "tried for conspiracy and libel, and convicted," is justified, if literally true, though plaintiff, after a conviction and before the publication, had succeeded in having one case against him dismissed, and had taken an appeal in the other: Boogher v. Knapp, Mo. 11 S. W. Rep. 45.

CAPITAL PUNISHMENT.—The Michigan house of representatives has passed the capital punishment bill. It requires in case of convictions for murder that every juryman must sign a written verdict recommending the death penalty before it can be imposed, and even then the trial judge may exercise his discretion and make the sentence life imprisonment. The execution must be by hanging or by a shock of electricity.

DIVORCE STATISTICS.—In the matter of divorces Illinois is reported by Commissioner Wright to lead all the other States. During twenty years it has never had less than 1,000 granted appeals for divorce. It now averages over 2,000 cases per year. Indiana and Ohio stand next on the list, followed closely by Missiouri and Michigan. New York shows but about 15,000 cases in twenty years to 25,000 for Indiana. The showing is not dependent on any special line of immigrants, for Michigan, Ohio and New York are emphatically settled by New Englanders, while Indiana and Missouri and Illinois are not. But the puzzle is that the Illinois divorce laws are not as lax as in many other States. Chicago's phenomenal wickedness is probably accountable for the statistics of the State.

A NEW Maine statute includes in the order of "tramps," whoever goes about from town to town asking for food or shelter, or begging or subsisting upon charity. It was put in force a week ago, and the first case was a strong illustration of its injustice. Two able bodied men were returning to their homes in Massachusetts after spending their winter chopping in the forest. Unfortunately their wages had been exhausted, and on their appearance at the Biddeford police station to ask for shelter, they were arrested and subjected to a penalty of sixty days' imprisonment of ten hours a day at hard labor—this is the inflexible punishment of the letter of the law.—*New Haven Journal.*

OBITUARY

The death, on Sunday May 19, in New York, of Peter Carpenter Baker, the head of the well known law publishing firm of Baker, Voorhis & Co., was painfully sudden and unexpected, and removes one, who for over a quarter of a century has been prominent among law book publishers. Though not young in years, his

strong physique and rugged appearance indicated unexpended vitality and gave promise of many years of activity and usefulness. Mr. Baker was a man of eminent business ability, and of spotless integrity. Genial in disposition and kind of heart, he made friends of all with whom he came in contact. We knew him well and we feel that we but echo the sentiment of all publishers and authors in expressing genuine admiration for the man, and deep regret at his death.

RECENT PUBLICATIONS.

A SUMMARY OF THE COMMERCIAL LAW OF THE UNITED STATES, WITH BUSINESS FORMS AND PRACTICAL SUGGESTIONS. Designed for the uses of Merchants, Bankers, Manufacturers, Farmers, Mechanics, Factors, Brokers and other agents; Clerks, Conveyancers, Commissioners, Notaries and Justices of the Peace; Shippers, Carriers, and Insurance, Telegraph and Telephone Companies, and men of business of all classes in all the States and Territories. Also, adapted to use as a Text Book in Commercial and other schools and colleges, by Lee Knowlton Mihills, L.L. B., of the Akron (Ohio) Bar, and late Professor of Law in Buchtel College. Des Moines, Iowa: Mills Publishing Company. 1889.

A well-established prejudice against books of this kind exists in the minds of a large proportion of the profession. Whether the significant sneer at the "every man his own lawyer" style of legal literature is grounded upon sufficient reason, or is prompted simply by a mercenary desire on the part of practitioners to deter the public, as far as possible, from acting as their own lawyers, we do not undertake to say, but the fact of the prejudice does, undoubtedly, exist. Therefore, so far as the legal fraternity is concerned, we venture the prediction that this volume will hardly meet with a cordial reception, notwithstanding the author's disclaimer of purpose, in his preface, to make everybody his own lawyer. Nor are we decrying the merits of the work in the assertion that few lawyers will find within its pages much of real positive value. It consists of a grouping together of the elementary principles pertaining to the law of Contracts, Agency, Partnership Corporations, Negotiable Instruments, Sales, Mortgages, Liens, Carriers, Deeds, Leases, Insurance, Shipping, Exemptions, Limitations, Wills, etc., with forms such as are in common and general use, and the statutes governing Copyrights, United States Postal Regulations, Internal Revenue, Duties upon Imports and the Interstate Commerce Law. The author cites no authorities whatever. From this statement it will readily be seen that it contains but little with which the average practitioner is not, or at least, should not be, familiar. This does not, however, apply to the forms or the compendium of statutes, which at times may afford the practitioner a means of ready reference.

The author in his preface says that the book is designed for the use of Merchants, Bankers, Farmers, Mechanics and business men generally. To such we can understand that the book, if properly used, will give value. There are many questions arising from day to day in the life of a business man upon which it may not be necessary or convenient to take the advice of a lawyer, and at such times a book of this kind will be found useful, though the danger is in an absolute reliance upon statements of general principles for the settlement of special cases. The author is an old and valued friend of this JOURNAL, to which he has contributed many interesting papers, and we feel sure that this book will be found accurate and carefully prepared as far as it goes.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XXVI. Practice. St. Louis, Mo.: The Gilbert Book Company. 1889.

We have so often written in favorable terms of this series of reports, and the profession generally are so fully acquainted with their merits, that it was our intention not to notice this volume further than by acknowledging its receipt in "Books Received." But the subject of which this volume treats "Practice," is so important and of such interest that it seems best to call attention to it. The practitioner in the United States courts will find herein a complete compendium of the law pertaining to that branch of practice, including Admiralty, Equity and Removal of Causes.

QUERIES AND ANSWERS.

[*Subscribers are invited to send short answers to the following.*]

QUERY NO. 20.

A statute provides that, "if the inheritance came to the intestate by *gift*, *devise* or *descent* from the paternal line, it shall go to the paternal grandfather and grandmother as joint tenants, etc. A father had his life insured in favor of his only child. At his death, his wife being dead, the child received the proceeds of the policy. At her death, she being unmarried and childless, would such "proceeds" descend to her paternal grandparents, or would it be controlled by another statute, viz.: "If the estate come to the intestate otherwise than by gift, devise or descent, it shall be divided into two equal parts, one of which shall go to the paternal, and the other to the maternal kindred." Suppose the insurance policy was drawn payable to the mother on the child's death, would the "inheritance" go to the maternal line, under a section providing that, "if the inheritance come to the intestate by gift, devise or descent from the maternal line, it shall go to the maternal line?" W. W. T.

QUERY NO. 21.

A and B enter into a party-wall agreement, by the terms of which A is permitted to place his wall six inches on the land of B, who covenants for himself, his heirs and assigns, that when he or they make use of the wall they will pay to A, his heirs and assigns, one-half of the value of said wall. A sells to C and B sells to D, with parol notice of the existence of party-wall agreement, which is at the time unrecorded. D appropriates part of the wall, and, on refusal to pay for same on demand of C, C sues B and D. Is this a personal contract enforceable against B, or is it one which runs with the land so as to bind D only? A. J.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMIRALTY—Jurisdiction.——A court of admiralty has no jurisdiction of a libel *in rem* against vessels navigating a river, for damage negligently caused by them to a swing-bridge resting on a pier, constructed on the bed of the river.—*City of Milwaukee v. The Curtis*, U. S. D. C. (Wis.), 37 Fed. Rep. 705.

2. ADMIRALTY—Jurisdiction—Damages. —— The admiralty courts cannot take cognizance of a libel for damages for death caused by negligence on the high seas, in the absence of an act of congress giving a right of action therefor, though the vessel proceeded against is a foreign one.—*The Alaska*, U. S. S. C., 9 S. C. Rep. 461.

3. ANIMAL—Vicious Horse. —— In action for injuries sustained by plaintiff in assisting defendant with vicious horse, the plaintiff must not only prove viciousness of horse, and representation of defendant that horse was gentle but must also show knowledge of defendant as to viciousness.—*Finney v. Curtis*, Cal., 21 Pac. Rep. 120.

4. APPEAL.——An action at law, or a final order in any special proceeding therein, can be reviewed only on error; but an action in equity, or any special proceeding therein in the nature of a final order, may be reviewed on appeal.—*Morse v. Engle*, Neb., 41 N. W. Rep. 1098.

5. APPEAL—Bond— Supersedeas. —— Under Rev. St. Mo. § 3713, the order of the court approving the bond and allowing the appeal is a determination that the amount of the bond is sufficient, and operates as a *supersedeas*, regardless of the actual amount of the bond. —*State v. Dillon*, Mo., 11 S. W. Rep. 255.

6. ARBITRATION AND AWARD — Misconduct. —— An award is properly set aside where one of the arbitrators remained at the house of the successful party several nights, partaking of his hospitality, while engaged in the arbitration, and another of them dined at a hotel at such party's expense. — *Robinson v. Shanks*, Ind., 20 N. E. Rep. 713.

7. ARBITRATION — Incomplete Award. ——An award which is not complete as to all the matters included in the submission is void altogether, and is not admissible even as an account stated.— *Hamilton v. Hart*, Penn., 17 Atl. Rep. 226.

8. ASSIGNMENT FOR THE BENEFIT OF CREDITORS. —— A voluntary assignment for the benefit of creditors, executed in another State, and valid there, will be enforced as against creditors of the assignor resident in such State subsequently attaching property of the debtor in this State. — *Woodward v. Brooks*, Ill., 20 N. E. Rep. 685.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS. —— A debtor conveyed his stock of goods, accounts, etc., to his creditor by an absolute bill of sale, containing no reservation or words of trust. The creditor accepted the property in satisfaction of his debt, which was less than its value, but he also absolutely assumed and agreed to pay certain other creditors' claims, the whole amount exceeding the value of the stock and other property included in the conveyance: *Held*, a valid sale, and not an assignment.—*Powell v. Kelly*, Ga., 9 S. E. Rep. 278.

10. ATTACHMENT — Dissolution, —— On a hearing to dissolve an attachment, when the party against whom the attachment has issued files an affidavit denying the grounds upon which the writ issued and the party who procured the attachment refuses to offer evidence to sustain it, it is error not to sustain motion to dissolve.—*Mitchell v. Carney*, Kan., 21 Pac. Rep. 158.

11. ATTACHMENT — Lien. —— The mere issuing of an attachment, and placing it in the hands of a sheriff, gives no lien, and an attachment subsequently issued, but first levied, holds the property as against it. — *May v. Buckhannon River Lumber Co.*, Md., 17 Atl. Rep. 274.

12. ATTACHMENT—Indemnity Bond. —— Sureties on an indemnifying bond are not liable for injury to goods attached resulting from the negligence or misconduct of the sheriff in keeping them.— *Smokey v. Peters & Calhoun Co.*, Miss., 5 South. Rep. 632.

13. ATTACHMENT — Discharge. —— Where there is another action pending between the same parties for the same cause, in which an order of attachment has been issued, and the property of the defendant levied upon, such pending action and attachment proceedings are sufficient grounds for a district judge to discharge an attachment issued in a subsequent action, brought by the same plaintiff against the same defendant upon the same cause of action. — *Smith Frazer Boot & Shoe Co. v. Derse*, Kan., 21 Pac. Rep. 167.

14. ATTORNEY AND CLIENT — Privileged Communications. —— Communications made by testator to his attorney, who drew the notes and deeds of trust securing them, made at the time they were drawn in the presence of defendant and the person from whom he bought the land to pay for which the money was borrowed, are not privileged.— *Hughes v. Boone*, N. Car., 9 S. E. Rep. 286.

15. BANKS AND BANKING—Depositor. —— A depositor of a certain bank instructed it to charge to his accounts a note upon which he was surety, and which was payable to the bank. The note was not so charged, but it was agreed that the bank should at any time thereafter have the right to make such entry, and that the note should be held by the bank to be collected for the benefit of the depositor: *Held*, that such agreement gave to the bank a right which it would not otherwise have had, and that the depositor became the owner of the note.—*Harrison v. Harrison*, Ind., 20 N. E. Rep. 746.

16. BOND— Constable. —— Under Rev. St. Ind. § 722, providing that chattels mortgaged may be levied on and sold, and that the purchaser shall be entitled to possession on complying with the terms of the mortgage, a constable is liable on his bond for turning over mortgaged property to a purchaser at an execution sale before the latter has complied with the conditions of the mortgage.—*McDaniel v. State*, Ind , 20 N. E. Rep. 739.

17. CARRIERS — Injuries to Stock. —— A race-horse shipped by plaintiff over the defendant's road was in-

jured in a wreck: *Held*, that an agreement made by the general freight agent of the defendant, who went to the place of the wreck by the authority of the defendant to look after injured property, by which the defendant was to take the injured horse, and pay to plaintiff a certain sum in settlement of his claim for damages, was within the authority of the agent, and was founded on a sufficient consideration. — *Chicago & E. I. R. Co. v. Katzenbach*, Ind., 20 N. E. Rep. 709.

18. CARRIERS—Goods— Baggage. —— Where an emigrant carries trunks and other ordinary baggage, and at the same time turns over other boxes of goods to the carrier for transportation, paying freight for the weight in excess of her baggage allowance, and the general character of the shipment is known to the carrier, it cannot be conclusively presumed that the entire shipment is baggage, so as to make applicable the rule that there can be no recovery in case of loss except for such articles contained in the boxes as would properly be designated as necessary baggage. — *Hamburg-American Packet Co. v. Gattman*, Ill., 20 N. E. Rep. 662.

19. CONFLICT OF LAWS — Option Contract. —— Contracts for the future delivery of cotton, made by a commission merchant in New Orleans, to be performed there, for his principal, residing in the State of Mississippi, are governed by the laws of the State of Louisiana, and, if valid in that State, will be enforced by the circuit court of the United States in the State of Mississippi.— *Lehman v. Feld*, U. S. C. C. (Miss.), 37 Fed. Rep. 852.

20. CONSTITUTIONAL LAW—Office and Officer.——Const. Mich. art. 12, § 7, which provides that the legislature shall provide by law for the removal of county officers commits to the legislature the whole subject of removal, and the determination of the existence of cause for removal may be vested by it in other departments of the State government than the judicial, though it involves the exercise of judicial powers. — *People v. Stuart*, Mich., 41 N. W. Rep. 1091.

21. CONTRACT — Breach of Marriage Promise. —— In an action for breach of marriage promise, an instruction that if certain facts are true plaintiff may recover is not reversible error for omitting from view the defense of limitation, where another instruction clearly states that, if the limitation has expired before the bringing of the action, plaintiff cannot recover. — *Schreder v. Michel*, Mo., 11 S. W. Rep. 314.

22. CONTRACTS—Illegality. —— In suit on note given for losses sustained in option dealing: *Held*, that where there was no intention of the parties to purchase and receive the grain, and no intention of the sellers to deliver the same, no recovery could be had on the contract.—*Sprague v. Warren*, Neb., 41 N. W. Rep. 1113.

23. CORPORATIONS—Stockholders.—— Assuming that the insolvency law includes and applies to corporations, a release of a debt due from a corporation by its creditor, and a judgment of a court thereon discharging the debtor pursuant to the provisions of said insolvency law, releases and discharges the stockholders in said corporation from the personal liability imposed by § 3, art. 10, of the constitution of the State. —*Mohr v. Minn. Elevator Co.*, Minn., 41 N. W. Rep. 1074.

24. CORPORATIONS—Officers — Misappropriation. —— An appropriation by the directors of a corporation of its funds as compensation to its president for services rendered at a time when there was no by-law or resolution authorizing payment for the services is unauthorized, and the corporation, by its receiver, may recover the funds so appropriated. — *Ellis v. Ward*, Ill., 20 N. E. Rep. 671.

25. CORPORATIONS—Associations.——Mere voluntary associations are incapable of taking and holding real property in their society name, but it may be held for their use and benefit through the intervention of a trustee, who may be a natural or artificial person. — *Liggett v. Ladd*, Oreg., 21 Pac. Rep. 133.

26. CORPORATIONS.—— Where one corporation seeks judicial redress against another corporation, on the ground that the other has refused to give a service, or to perform a duty which it owes, the complaining corporation, to succeed, must show, affirmatively, that the service or duty which it claims exists by force of a statute, or a contract, or a usage having the force of law.—*Delaware, L. & W. R. Co. v. Central, etc. Co.*, N. J., 17 Atl. Rep. 146.

27. COUNTIES—Courts. —— The rule that a court of record can act only through its orders made of record does not require, where the court has large administrative and executive powers, with authority to appoint agents, that all the acts of the agents should appear of record.—*Bullitt County v. Washer*, U. S. S. C., 9 S. C. Rep. 499.

28. COURTS—Special Judge.——Under Rev. St. Mo. §§ 1107, 1111, the special judge upon taking the oath becomes the judge of the court for all the purposes of the particular case even though before it is tried a regular judge is on the bench.— *Noffzieger v. Reed*, Mo., 11 S. W. Rep. 315.

29. COURTS— Jurisdiction. —— A railroad company, whose road extends from Atlanta, Ga., through South Carolina to Charlotte, N. C., the office of its division superintendent being in Atlanta, may be sued in the Georgia courts by a citizen of Georgia, for personal injuries received while traveling on its road in South Carolina, especially where it appears that the train on which the accident happened was being operated under the superintendent's control.— *Hills v. Richmond & D. R. Co.*, U. S. C. C., Ga., 37 Fed. Rep. 660.

30. COVENANT. —— Measure of Damages under the facts for breach of covenant of warranty. — *Danfort v. Smith*, Kan., 21 Pac. Rep. 168.

31. CRIMINAL LAW— Burglary. —— In an indictment for burglary it is necessary that the name of the owner of the building broken into should be given, and for this purpose the person in the visible occupancy and control of the premises at the time of the burglary may be set out as the owner, whether he be the owner of the title, or a tenant. — *Winslow v. State*, Neb., 41 N. W. Rep. 1116.

32. CRIMINAL LAW—Homicide—Sanity. —— An instruction that "insanity, when once shown to exist in an individual, is presumed to continue until the contrary is shown by the evidence," is not erroneous because omitting the words "beyond a reasonable doubt," where there is a following instruction that "evidence rebutting the presumption of sanity need not, to entitle defendant to acquittal, predominate in his favor." — *Grubb v. State*, Ind., 20 N. E. Rep. 725.

33. CRIMINAL LAW—Misdemeanor.—— The complaint referred to in Laws 1885, relating to procedure before justices in misdemeanors, is the party who makes to a justice of the peace, on his oath or affirmation, a complaint charging a person with the commission of a misdemeanor.—*In re Winne*, Kan., 21 Pac. Rep. 176.

34. CRIMINAL LAW—Murder. —— Instruction in criminal case that the jury render such a verdict as they believe is fair, just, and right, is erroneous, as they must be satisfied beyond reasonable doubt. — *Territory v. Kay*, Ariz., 21 Pac. Rep. 152.

35 CRIMINAL LAW—Gaming.——The dealer of a game of stud poker is an accomplice with those who bet money or value at such game.— *State v. Light*, Oreg., 21 Pac. Rep. 132.

36. CRIMINAL LAW—Perjury.——Statements sworn to on application to commute homestead entry to cash entry are not required by law and perjury cannot be predicated on them. — *United States v. Howard*, U. S. D. C. (Ala.), 37 Fed. Rep. 666.

37. CRIMINAL LAW— Murder. —— An instruction that "evidence of casual statements or admissions by a party, made in casual conversation and to disinterested persons, are regarded by law as the weakest kind of evidence that can be produced, owing to the liability of the witness to misunderstand or forget," etc., is properly refused.—*State v. Glahn*, Mo., 11 S. W. Rep. 260.

38. CRIMINAL LAW — Larceny. —— One who has the

bare custody of property as the employee or servant of the owner, is guilty of larceny, if he fraudulently appropriates such property to his own use. — *Crocheron v. State*, Ala., 5 Sonth. Rep. 649.

39. CRIMINAL LAW—District Attorney.—— The district attorney is the legal advisor of the grand jury, and may be present at, and assist them in, their examination of cases, provided he does not take part in their deliberations as to their conclusions and findings.—*State v. Aleck*, La., 5 South. Rep. 639.

40. DEDICATION.——Evidence sufficient to constitute a dedication of land to public use. — *Pierce v. Roberts*, Conn., 17 Atl. Rep. 278.

41. DEED — Constructive Notice. —— Where the description of land in a deed is insufficient to pass the title because of omissions therein, made through the mistake of the parties thereto, and, subsequent to the record thereof, the same land is conveyed to a third party, who has no actual notice of the prior deed, the record is not constructive notice to the latter of the equitable rights of the former purchaser. — *Bailey v. Galpin*, Minn., 41 N. W. Rep. 1054.

42. DEED—Construction.——A deed of conveyance to a husband and wife residing in Barbour county, then in Virginia, for a tract of land situated in said county, did not confer upon the husband title to the undivided moiety of said land, but said husband and wife took by entireties.— *Farmers' Bank v. Corder*, W. Va., 9 S. E. Rep. 220.

43. DEED—Escrow.—— Where a deed is delivered by the grantor to a third person, to be held in escrow, until the grantee shall have paid a specified debt, and the deed is delivered before the debt is fully paid, but it is subsequently paid: *Held*, the delivery will be operative, and the deed valid, at least from the time the debt is fully paid.—*Connell v. Connell*, W. Va., 9 S. E. Rep. 252.

44. DIVORCE—Alimony. —— The statutes of Oregon, which prohibit a divorced party from contracting marriage with a third person until the expiration of the period allowed to take an appeal from the decree granting the divorce, which is six months, makes the marriage between plaintiff and defendant a nullity, and precludes the recovery of alimony. — *Wilhite v. Wilhite*, Kan., 21 Pac. Rep. 178.

45. ELECTIONS— County Attorney. —— A county attorney is a county officer and the county court of the proper county has original jurisdiction in a proceeding to contest the election of said attorney, and the supreme court has not original jurisdiction. — *Bell v. Templin*, Neb., 41 N. W. Rep. 1093.

46. EMINENT DOMAIN — Street. —— Defendant constructed its railroad upon a public street for which no grade had been established, but which would evidently require grading in the near future. The track was laid two or three feet above the natural level of the street, practically cutting off access from the street to plaintiffs abutting lots: *Held*, that plaintiff was entitled at least to nominal damages, and to such actual damages as he may suffer by the diminution of rental value, but he could not recover for a depreciation in the total value of the inheritance, as it cannot be presumed, in view of the condition of the street, that a permanent nuisance was intended.—*Smith v. Kansas City, St. J. & C. B. Ry. Co.*, Mo , 11 S. W. Rep. 259.

47. EQUITY—Injunction—City Council.—— A court of equity has no jurisdiction to restrain the council of a city from proceeding to investigate charges preferred against trustees of the water works in the mode provided by the by-laws and ordinances of the city. — *Muhler v. Hedekin*, Ind., 20 N. E. Rep. 700.

48. EQUITY— Bill of Review. —— A bill of review for newly-discovered evidence will not lie where the evidence is simply confirmatory or cumulative. It must be decisive in its character. — *Davis Sewing-Machine Co. v. Dunbar*, W. Va., 9 S. E. Rep. 287.

49. EQUITY. —— A doubtful or partial remedy at law does not exclude the injured party from relief in equity. A suit may be maintained in a court of equity by or in the name of the sheriff, under § 15, ch. 141, Code 1887, where there is a conflict between two or more execution creditors in respect to the same fund or property, and such suit will avoid a multiplicity of suits. — *Nease v. Ætna Ins. Co.*, W. Va., 9 S. E. Rep. 233.

50. EQUITY— Void Tax deed. —— Though a tax deed be void for illegality in the proceedings, equity will give relief on bill to remove a cloud from title, particularly where the illegality does not appear wholly on the face of records. — *Lyon v. Alley*, U. S. S. C., 9 S. C. Rep. 480.

51. EVIDENCE — Parol. —— Parol evidence held admissible to explain ambiguity in contract for legal services.—*Louisville, N. A. & C. R. R. Co. v. Reynolds*, Ind., 20 N. E. Rep. 711.

52. EVIDENCE—Admissions.—— In an action for personal injuries, defendant having shown that plaintiff had made statements contrary to his testimony, which statements showed that the accident was due to his own carelessness, plaintiff cannot show that he had made other statements consistent with his testimony.—*Logansport Turnpike Co. v. Heil*, Ind., 20 N. E. Rep. 703.

53. EVIDENCE—Production of Books.——A court will not before the trial of an action, at the instance of a party thereto, require a disinterested person to produce his private books for inspection, though they contain accounts the examination of which is important to the preparation of the case for trial. — *Marion Nat. Bank v. Abell's Admx.*, Ky., 11 S. W. Rep. 300.

54. EXECUTION — Fraudulent Representations. —— Suit for deceit and fraudulent representations in the purchase of goods on credit is not a suit in tort and a judgment by default therein was not a judgment for a tort within meaning of statute authorizing body execution.—*People v. Healy*, Ill., 20 N. E. Rep. 692.

55. EXECUTION. —— Defendant assumed to levy on plaintiff's goods in its office, telling the agent in charge that they were "just the same as theirs, or in their hands," but he "could use it just the same." The agent, at defendant's request, receipted for the property. Notices of sale were not posted, and the property was not removed: *Held*, that a levy was made.—*Chicago & W. M. Ry. Co. v. Reid*, Mich., 41 N. W. Rep. 1083.

56. EXECUTORS AND ADMINISTRATORS — Sale. —— An administrator may sell a lease of real estate for a term of twenty-five years, held by his intestate as personal property, under a proper order from the county court, without obtaining a license therefor from the district court as in case of the sale of real estate for the payment of debts.— *Mulloy v. Kyle*, Neb., 41 N. W. Rep. 1117.

57. EXEMPTION—Conveyance of Exempt Property.—— Where land has been duly set apart to a judgment debtor as exempt, he may thereafter convey it as he chooses, free from any lien of the judgment or right of the judgment creditor. — *Ray v. Yarnell*, Ind., 20 N. E. Rep. 705.

58. FRAUDS— Statute of. —— A parol contract that is not to be performed within a year from the making thereof, and not relating to land, is not enforceable or taken out of the operation of the statute of frauds by a part performance, as that equitable doctrine applies only to contracts relating to land. — *Osborne v. Kimball*, Kan., 21 Pac. Rep. 163.

59. FRAUD—Estoppel. —— Application to the facts of the doctrine that, if a representation has been procured by fraud, there will be no estoppel upon the party making it though he made it with the intent that it should be acted upon.—*German Sav. Inst. v. Jacoby*, Mo., 11 S. W. Rep. 206.

60. FRAUDULENT CONVEYANCE. —— The retention of possession by the grantor of land is *prima facie* evidence that the conveyance was fraudulent.—*Cooper v. Davison*, Ala., 5 South. Rep. 650.

61. GUARDIAN AND WARD — Accounting. —— While a tutor is liable for the revenues yielded by the property of his wards, under his control and administration, and which he has collected, he is entitled to be credited, in

statement with them, with all disbursements for insurance, repairs, taxes, board and lodging, etc., made by him in his official capacity. — *Mahony v. Mahony*, La., 5 South. Rep. 643.

62. HIGHWAYS—Establishment. ——Under § 46, of ch. 78, Compiled statutes, the order of the county board declaring a section line to be a public highway, and ordering it to be opened by survey of the county surveyor, is an establishment of a public highway on such line, which can only be vacated by pursuing the course designated in said chapter.— *McNair v. State*, Neb., 41 N. W. Rep. 1099.

63. HOMESTEAD.—— Under the California statute requiring the declaration of a homestead to contain a description of the premises, and "an estimate of their actual cash value," a declaration stating that the property claimed "does not exceed in value the sum of $5,000" is sufficient.—*Southwick v. Davis*, Cal., 21 Pac. Rep. 121.

64. HOMESTEAD — Abandonment. —— Evidence held sufficient to show an intention to abandon the homestead.—*Kaufman v. Fore*, Tex., 11 S. W. Rep. 278.

65. HOMESTEAD.—— The right of homestead and exemption is the creature of the legislature, and can be limited according to the legislative will in any respect and at any time; and the law in force at the time of the death of husband and wife, and not the law in force at the time the homestead was created, controls as to the rights of the survivor. — *Tyrrell v. Baldwin*, Cal., 21 Pac. Rep. 116.

66. HUSBAND AND WIFE. —— Where a parol gift of land is made to a married woman by her father, and she and her husband take possession, the husband acquires no interest, except as tenant by curtesy in case he survive her. — *Tomlin v. Franks*, Ky., 11 S. W. Rep. 296.

67. HUSBAND AND WIFE — Power of Attorney. —— A married woman may appoint her husband by power of attorney as her agent to convey the inchoate interest which she holds in his real estate.—*Munger v. Baldridge*, Kan., 21 Pac. Rep. 159.

68. HUSBAND AND WIFE. —— A wife living with her husband on land, and claiming the land as her separate estate, under a right derived from a person other than her husband, prior to commencement of the action, cannot be turned out of possession by a writ of possession in an action of ejectment against her husband to which she was not a party. — *Bushong v. Rector*, W. Va., 9 S. E. Rep. 225.

69. HUSBAND AND WIFE— Adverse Possession.—— It is the law of Missouri that the adverse possession for the statutory period which will defeat the husband's sole right of possession of his wife's land will likewise defeat an action of ejectment therefor brought by the husband and wife jointly.—*Deguire v. St. Joseph Lead Co.*, U. S. C. C. (Mo.), 37 Fed. Rep. 663.

70. INSURANCE—Principal and Agent.——An agent of a mutual insurance company, authorized to issue policies of insurance, and consummate the contract, binds the company by any act, agreement, waiver, or representation within the ordinary scope and limit of insurance business, which is not known by the assured to be outside the authority granted to the agent. — *National Mut. Fire Ins. Co. v. Barnes*, Kan., 21 Pac. Rep. 165.

71. INSURANCE— Assignment of Policy. —— Where a fire insurance company issues a policy with power to assign it, the assignee is not affected by any conditions not shown in the policy of which he had no notice, although they were known to his assignor. — *Miller v. Hillsborough Mut. Fire Assn.*, N. J., 17 Atl. Rep. 293.

72. INTEREST — Costs. —— A complaint alleged that defendant wrongfully converted certain property to plaintiff's damage in a given sum, and alleged also that that sum was the value of the property, and demanded judgment for that sum, with interest from the date of conversion. Under Rev. St. Mont. §§ 1236, 1237: *Held*, that the interest was unauthorized from the day of the conversion, but could be recovered only from the date of the judgment for damages.—*Palmer v. Murray*, Mont., 21 Pac. Rep. 126.

73. INTOXICATING LIQUORS— Cival Damage. —— Under the Michigan civil damage law, a wife has a right of action where her husband and another both became intoxicated, and the husband's leg was broken in a scuffle, causing loss and injury to the wife. — *Thomas v. Dansby*, Mich., 41 N. W. Rep. 1088.

74. INTOXICATING LIQUORS— Ordinance. —— By Rev. St. Ind. 1881, § 5314, the county commissioners are only authorized to grant licenses to male inhabitants of the State: *Held*, that a male inhabitant of the State, prosecuted for a violation of such ordinance, could not complain that an unjust discrimination was made against women and non-residents. — *Wagner v. Town of Garrett*, Ind., 20 N. E. Rep. 706.

75. INTOXICATING LIQUORS — Gift to Minor. —— One who furnishes liquor to a minor at the instance of a third person, who is to pay for the liquor and give it to the minor, is guilty of giving liquor to a minor under Rev. St. Ind. 1881, § 2094, making such gift a misdemeanor.—*Topper v. State*, Ind., 20 N. E. Rep. 699.

76. JUDGMENT—Divorce.——In an action for divorce, where service was had by publication only, the publication of a notice requiring the defendant to answer on or before the second Monday after completed service, instead of the third as provided by Code, would not prevent the court from acquiring jurisdiction, and a decree rendered in such case would, perhaps, not be open to collateral attack, but would be subject to be set aside on motion. — *Wilkins v. Wilkins*, Neb., 41 N. W. Rep. 1101.

77. JURY—Right to Jury Trial. —— In indiana, whenever the cause of action is one that can only be enforced by invoking the equitable powers of the court, then the right of trial by jury does not maintain, but if the cause of action does not depend on the equity jurisdiction of the court, a jury may be demanded. — *Martin v. Martin*, Ind., 20 N. E. Rep. 763.

78. LANDLORD AND TENANT—Notice to Quit.—— Where in an action by a landlord to recover possession after the expiration of the term, it appears that the tenancy was by a written lease for a period of one year, there is no error in admitting in evidence a written notice to quit, though the notice was not served in the manner required by statute. — *Snideman v. Snideman*, Ind., 20 N. E. Rep. 723.

79. LIBEL AND SLANDER. —— In an action for libel by charging plaintiff with fraudulently appropriating money of an insurance society of which he was an officer, defendant may show the society's business methods, as tending to show that it was possible for plaintiff to appropriate the funds.— *Mosier v. Stoll*, Ind., 20 N. E. Rep. 752.

80. LIMITATION OF ACTIONS. —— *Held*, that the claim upon which suit was predicated was barred by the statute of limitations, and if the plaintiff relied upon any of the statutory or other exceptions to take said claim out of the operation of statute it should have been set forth in a replication to plea.— *Laidley v. Smith's Ex.*, W. Va., 9 S. E. Rep. 209.

81. MARITIME LIENS—Seamen.——Sailors who ship at New York for a voyage via Mobile to South America and return, are entitled, upon the seizure of the vessel under process at Mobile, only to wages then due, it appearing that they can obtain other similar employment at equal or better wages, and there being no proof of any special damage or of return expenses to their homes.—*The Augustine Kobbe*, U. S. D. C. (Ala.), 37 Fed. Rep. 696.

82. MASTER AND SERVANT—Contract.——The prevention of filing liens for services rendered in grading the railway was a sufficient consideration between employees of such subcontractor in grading the railway road-bed and the contractor, who had agreed to save the railway company harmless from such liens.—*Carlile v. Dauchy*, Neb., 41 N. W. Rep. 1119.

83. MASTER AND SERVANT—Negligence. —— Evidence reviewed and held to sustain verdict for plaintiff injured in defective elevator of defendant.— *Oberfelder v Doran*, Neb., 41 N. W. Rep. 1094.

84. MASTER AND SERVANT — Negligence. —— Where deceased was injured crossing tracks in defendants yard, going to his work: *Held*, that if the failure of the company to provide a safe passway was negligence, the deceased, by remaining at the works, with full knowledge of the danger, and by attempting to cross, voluntarily assumed the risk. — *Lord v. Pueblo Smelting Co.*, Colo., 21 Pac. Rep. 148.

85. MASTER AND SERVANT.—— In an action for injury to plaintiff through escape of gas from a receiver: *Held*, that plaintiff was not acting under the orders of his employer, but on his own responsibility, knowing the danger, and could not recover damages for his injuries. —*Taylor v. Baldwin*, Cal., 21 Pac. Rep. 124.

86. MASTER AND SERVANT. —— Plaintiff, a brakeman on defendant's train, was injured in an accident caused by a bull on the track: *Held*, that even if plaintiff knew that the engine was without a cow-catcher, and the fences along the track were defective, the question of his recovery was for the jury.— *Magee v. North Pacific C. R. Co.*, Cal., 21 Pac. Rep. 114.

87. MECHANIC'S LIENS.—— Constructing of Mansf. Dig. Ark §§ 4403, 4404, relating to mechanics' liens as amended by act March 17, 1885, requiring the owner to retain for ten days one-third of the cost.—*Bashan v. Toors*, Ark., 11 S. W. Rep. 280.

88. MECHANICS' LIENS — Subcontractors. —— Under Mansf. Dig. Ark. § 4422, relating to mechanics' liens, one who works for the contractor is a subcontractor. — *Buckley v. Taylor*, Ark., 11 S. W. Rep. 281.

89. MINES AND MINING—Taxation.——*Held*, that Sess. Laws, 1887, § 1, subjects all mining property to taxation, but divides it into two classes,—mines or claims producing an annual output exceeding $1,000, and all other mining property, without reference to value, and there is no such unreasonableness in the division made by the act as will justify judicial interference. — *People v. Henderson*, Colo., 21 Pac. Rep. 145.

90. MINES AND MINING—Quieting Title. ——Under the practice act of Utah Territory a complaint in an action to quiet title to a mining claim, which states that plaintiff is in possession and that defendant claims an interest or an estate therein adverse to him, is sufficient to require the nature and character of the defendant's adverse claim to be set up, inquired into, and judicially determined.—*Parley's Park Silver Min. Co. v. Kerr.*, U. S. S. C., 9 S. C. Rep. 511.

91. MORTGAGES—Foreclosure.—— Under Rev. St. Ind. § 4392, relating to sale of land under mortgage foreclosure, the auditor is bound to a strict observance of the statute, and a sale of a portion of a tract taken out of the central and south easterly part, instead of the north-westerly corner, is void. — *Haynes v. Cox*, Ind., 20 N. E. Rep. 758.

92. MUNICIPAL CORPORATIONS—Public Improvements. —— It is error to charge a jury sworn to assess the benefits to be derived by the owner of property by the construction of a proposed sidewalk that they shall exclude from their consideration the present use to which the premises are put, but should determine whether their market value for any legitimate purpose for which they may be used will be increased by the improvement. — *Kankakee Stone & Lime Co. v. City of Kankakee*, Ill., 20 N. E. Rep. 670.

93. MUNICIPAL CORPORATIONS — Exclusive Franchise——Although a company had erected gas-works in a city by the authority of the city, and had complied with all the requirements of the common council, there was nothing in the statute which precluded the city from building its own gas-works.— *Hamilton Gas Light Co. v. City of Hamilton*, U. S. C. C. (Ohio), 37 Fed. Rep. 832.

94. MUNICIPAL CORPORATIONS—Public Improvements. ——Act Mo. March 28, 1881, authorizing a sewerage system in cities of a certain size, was not unconstitutional, because the cost of the construction of a sewer was authorized to be apportioned against the property fronting on the improvement in proportion to the frontage of each lot.—*Rutherford v. Hamilton*, Mo., 11 S. W. Rep. 249.

95. MUNICIPAL CORPORATIONS—Public Improvements. ——In a proceeding by the city to condemn property for the purpose of widening and extending a public highway, it appearing that the proposed street is for public use, the question as to whether there is any present public necessity for it cannot be determined.— *City of Kansas v. Baird*, Mo., 11 S. W. Rep. 243.

96. MUNICIPAL CORPORATIONS — Defective Sidewalks. ——Under the charter of St. Louis (2 Rev. St. Mo. p. 1626) where the plaintiff was injured by falling on a sidewalk at a place where ice and snow had been allowed to accumulate, it was not necessary to join as a party defendant with the city a certain corporation in front of whose premises such snow and ice had accumulated, although there was an ordinance requiring all persons to keep the sidewalks in front of their premises free from such accumulations.—*Norton v. City of St. Louis*, Mo., 11 S. W. Rep. 242.

97. NEGLIGENCE—Railroad Company. —— Defendant held not liable for negligence where child walking on track was run over by portion of a train which became uncoupled. — *Galveston H. & S. A. Ry. Co. v. Chambers*, Tex., 11 S. W. Rep. 279.

98. NEGLIGENCE. —— Defendant held liable for injuries to plaintiff an engineer who while standing on the main track was run over by a hand car and his right to recover was not defeated by the fact that at the time he was violating a rule of the railroad company, forbidding engineers to permit firemen to operate the engine, except when they are themselves present upon them.— *Barry v. Hannibal & St. J. Ry. Co.*, Mo., 11 S. W. Rep. 308.

99. NEGLIGENCE— Railroad Crossing. —— Defendant held guilty of negligence where deceased was injured crossing railroad tracks in defective condition. — *Tetherow v. St. J. & D. M. Ry. Co.*, Mo., 11 S. W. Rep. 310.

100. NEGOTIABLE INSTRUMENTS. —— A complaint in an action on a note, which alleges that the note has been accidentally destroyed by fire, and sets out a copy of it, need not allege that the destruction of the note occurred without plaintiff's fault.— *Cunningham v. Hoff*, Ind., 20 N. E. Rep. 756.

101. NEGOTIABLE INSTRUMENTS — Indorsement. —— One who obtains possession of a note after indorsing it is restored to his original position, and cannot, nor can subsequent purchasers from him with notice of the fact, hold intermediate indorsers, who could look to him again.—*Adrain v. McKaskill*, N. Car., 9 S. E. Rep. 284.

102. NEGOTIABLE INSTRUMENTS—Validity. —— Under Gen. St. Ky. ch. 22, § 13, where a note signed by defendant and one M, was made payable to the order of M, and the latter signed his name on the back of the note, and delivered it to the plaintiff, that the defendant became liable to the plaintiff.—*Jenkins v. Bass*, Ky., 11 S. W. Rep. 293.

103. NEW TRIAL — Mandamus. —— If a judgment is rendered against defendant for default of appearance, in an action commenced by attachment and personal service, for a greater sum than the amount of plaintiff's claim, as stated in the affidavit filed to obtain the attachment, the circuit court will be required by *mandamus* to grant a new trial, unless the plaintiff consents to remit the judgment down to the amount mentioned in the affidavit.—*Rose v. Palmer*, Mich., 41 N. W. Rep. 1080.

104. NEW TRIAL—Remittitur. —— The exaction, as a condition of refusing a new trial, that the prevailing party shall remit a portion of the verdict awarded, does not in any sense impair the constitutional right of trial by jury, and an order of the circuit court of the United States requiring a party to remit a portion of the verdict awarded as a condition for refusing a new trial is not subject to review by the supreme court. — *Arkansas Valley Co. v. Mann*, U. S. S. C., 9 S. C. Rep. 458.

105. PRINCIPAL AND AGENT—Sale.—— Defendant held

liable for goods ordered of plaintiff by one assuming to act as agent of defendant, with knowledge of the latter. —*Cooper v. Mulder*, Mich., 41 N. W. Rep. 1084.

106. PRINCIPAL AND AGENT — Contracts. —— Where plaintiffs' agent sells defendant plaintiffs' goods, to be paid for in services to be rendered by defendant to the agent, plaintiffs, by suing in *assumpsit*, for the price after having been informed of the terms of the sale, ratify all those terms, including the manner of payment.—*Shoninger v. Peabody*, Conn., 17 Atl. Rep. 278.

107. PUBLIC LANDS—Patents.—— In ejectment, plaintiff claiming under a patent from the State, and defendant contending that the patent was void, and asking that plaintiff be required to convey to defendant, the validity of the patent need not be considered, as if it is valid defendant has no rights, and if invalid a conveyance to defendant would give no title. — *Peabody v. Prince*, Cal,, 21 Pac. Rep. 123.

108. PUBLIC LANDS — Occupancy. —— Where unsurveyed public land is occupied by a settler with the intention to pre-empt it, but who dies before the survey is made, he has no vested interest which can pass to his heirs. Rev. St. U. S. § 2269, has no application to such a case. — *Buxton v. Traver*, U. S. S. C., 9 S. C. Rep. 509.

109. RAILROAD COMPANIES — Stock killing. —— Respecting the liability of railroad companies in stock-killing cases and as to what is negligence in such cases. —*Memphis & C. R. Co. v. Scott*, Tenn., 11 S. W. Rep. 317.

110. RAILROAD COMPANIES — Negligence. —— In an action against a railroad company for negligently and unlawfully leaving a car standing on the highway, at which plaintiff's horse became frightened, and caused her personal injuries, it is unnecessary to explain in the complaint how the horse came to be frightened, or to allege that there was anything unusual about the car calculated to produce such a fright. — *Pittsburgh, C. & St. L. R. Co. v. Kitley*, Ind., 20 N. E. Rep. 727.

111. RAILROAD COMPANIES— Negligence. —— A complaint for injuries, caused by plaintiff's horse taking fright at defendant's cars, is not bad on demurrer for failure to state that the car was permitted to remain on the highway an unreasonable time. — *Cleveland, C. C. & I. Ry. Co. v. Wynant*, Ind., 20 N. E. Rep. 730.

112. RAILROAD COMPANIES— Lease and Consolidation —None of the various statutes of the State of Oregon, either expressly or by implication, authorize a railroad corporation to lease its road and franchises, or to take similar leases from other railroad corporations; and such a lease is *ultra vires* and void. — *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, U. S. S. C., 9 S. C. Rep. 409.

113. RAILROAD COMPANIES — Injuries to Stock. —— Cattle belonging to plaintiff got on the track of the defendant railroad company within a few yards of a rapidly moving train, and were run over and killed. The engineer did not see the cattle until they were so close that he could not stop the train in time to save them, though after he saw them he did everything that was possible to avoid the collision: *Held*, that the defendant was not liable, although the engineer might have seen the cattle near the track for several hundred yards ahead. — *New Orleans & N. E. R. Co. v. Bourgeois*, Miss., 5 South. Rep. 629.

114. SALE—Stoppage in Transitu. ——The fact that at the time of a sale of goods the vendee was insolvent will not defeat the right of stoppage *in transitu* of the vendor, if the latter was not aware of such insolvency. — *Farrell v. Richmond & D. R. Co.*, N. Car., 9 S. E. Rep. 302.

115. SALE—Conditional.——Defendant bought a soda fountain from plaintiff, giving him notes payable one each month, stipulating that the title to the fountain did not pass till all the notes were paid. Defendant's store burned after he had received possession of the fountain and paid several of the notes, and the fountain was destroyed: *Held*, that he was none the less liable on the unpaid notes. — *Burnley v. Tufts*, Miss., 5 South. Rep. 627.

116. SPECIFIC PERFORMANCE. —— This court will not undertake to compel the specific performance of an agreement to take care of and provide for the complainant in case of her "general debility or sickness. — *Mowers v. Fogg*, N. J., 17 Atl. Rep. 298.

117. STATUTES—Validity.—The "validity" of a statute as used in act Cong. March 3, 1885, regulating appeals from supreme court of the District of Columbia refers to the power of congress to pass the act at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power. — *Baltimore & P. R. Co. v. Hopkins*, U. S. S. C., 9 S. C. Rep. 503.

118. STATUTES—Construction—"Town."——In a prosecution for keeping a private boarding-house in Mississippi City without paying tax, the question whether Mississippi City was a "town," or not, within the meaning of the statute, was a question of fact for the jury.—*Murphy v. State*, Miss., 5 South. Rep. 626.

119. TAXATION—Injunction. —— Where property, by collusion between the assessors and the owners, is intentionally assessed far below its true value, equity will relieve the owner of other property in the same city, fairly assessed, from such portion of the taxes thereon as is imposed by reason of the fraudulent undervaluation of the property first mentioned. —*Walsh v. King*, Mich., 41 N. W. Rep. 1080.

120. TAXATION — Judgment. —— The presumptions following ordinary judgment of courts of general jurisdiction follow the judgments rendered in tax proceedings. —*McGregor v. Morrow*, Kan., 21 Pac. Rep. 157.

121. TENANCY IN COMMON—Lien. —— Where one tenant in common pays off a lien against the joint property, he is entitled to contribution from the other tenants to the extent of their respective interests, and a court of equity will enforce upon the interests of the other tenants an equitable lien of the same character as that which has been removed. — *Moon v. Jennings*, Ind., 20 N. E. Rep. 748.

122. TRUSTS— Trustee — Advances. —— A trustee of land is not prevented from taking title in his own name, at the request of his *cestui que trust*, as security for money advanced on the latter's contract of purchase; and he may enforce his equitable lien for such advances.—*Stewart v. Fellows*, Ill., 20 N. E. Rep. 657.

123. TRUSTS—Constructive. —— Defendant conveyed to M, with covenant of warranty, etc., a one sixth interest in certain mineral land. At that time defendant had no title, but the owners of the legal title had orally agreed to convey to him a one third interest. Subsequently defendant, for the avowed purpose of defeating his deed to M, induced the owners of the legal title to convey the one-third interest to defendant's wife: *Held*, that the transaction must be regarded in equity as if the owners had conveyed to defendant and he to his wife, she holding in trust for M, and his heirs one-half of the interest conveyed to her. — *Moore v. Crawford*, U. S. S. C., 9 S. C. Rep. 447.

124. VENDOR AND VENDEE.——Under a judgment dissolving the sale of an immovable as an effect of the dissolving condition, express or implied, for non-payment of the price, the evicted vendee owes rents and revenves to the owner who has evicted him for the whole time of his possession, and not from the date of the suit for dissolution only.— *McKenzie v. Bacon*, La., 5 South. Rep. 640.

125. WAREHOUSEMEN—Estoppel. — Defendants, who were warehousemen, gave a receipt for 140 barrels of flour, "to be delivered only on return of this certificate, properly indorsed." The owners of the flour indorsed the receipt to plaintiff, to secure a loan: *Held*, that defendants were estopped to deny that they received the flour on the terms specified in the receipts. — *Babcock v. People's Sav. Bank*, Ind., 20 N. E. Rep. 782.